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Translated from the FRENCH of

M. DE SECONDAT,

BARON DE MONTERQUIEU

AREW TRANSLATION.

IN THREE VOLUMES.

V O L. III.

IN NOVA PERT ACCIONS MUTATAS DICERE FORMAN-

THE FIFTH EDITION, Carefully revised and improved with confiderable Additions by the Author.

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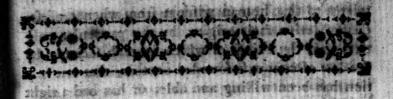
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### B O O K XXVI.

Of Laws with respect to the Order of Things on which they determine.

#### CHAP. I.

Idea of this Book.

by the law of nature; by the divine law, which is that of religion; by eccletiaftical, otherwise called canon law, which is that of religious polity; by the laws of nations, which may be confidered as the civil law of the whole universe, in which sense every nation is a citizen; by the general political law, which Vol. III.

relates to that human wisdom from whence all socicties derive their origin; by the particular political law, the object of which is each society; by the law of conquest sounded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every society, by which a citizen may defend his possessions and his life, against the attacks of any other citizen; in a word, by domestic law, which proceeds from a society's being divided into several families, all which have need of a particular government.

THERE are therefore various orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal redation, and not to throw into confusion those principles which should govern mankind.

#### CHAP. II.

#### Of Laws divine and human.

E ought not to decide by divine laws, what should be decided by human laws; nor determine by human, what should be determined by divine laws.

THESE two kinds of laws differ in their original,

in their object, and in their nature.

IT is univerfally acknowledged, that human laws are in their own nature different from those of religion; this is an important principle: but this principle is itself subject to others, which must be enquired after.

1. IT is in the nature of human laws to be fub-

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ject to all the accidents which can happen, and to vary in proportion as the will of man changes: on the contrary, by the nature of the laws of religion, they are never to vary. Human laws appoint for some good; those of religion for the best: good may have another object, because there are several forts of good: but the best is but one, it cannot therefore change. We may alter laws, because they are reputed no more than good; but the institutions of religion are always supposed to be the best.

of no value, as they depend only on the capricious and fickle humour of the fovereign. If in these kingdoms the laws of religion were of the same nature as the human institutions, the laws of religion too would be of no value. It is however necessary to the society, that it should have something fixed; and it is religion that has this stability.

3. The influence of religion proceeds from its being believed; that of human laws, from their being feared. Antiquity fuits with religion, because we have often a firmer belief of things, in proportion to their distance: for we have no ideas annexed to them drawn from those times, which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legislator to put them in execution.

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Of civil Laws contrary to the Law of Nature.

F a flave, fays Plato +, defends himfelf, and kills a freeman, he ought to be treated as a parricide. This is a civil law which punishes felf-de-

fence, though dictated by nature.

" THE law of Henry VIII. which condemned a man without being confronted by witnesses, was contrary to felf-defence. In order to pass sentence of condemnation, it is necessary that the witnesses should know, whether the man against whom they make their deposition is he whom they accuse, and that this man be at liberty to fay, I am not the perfon you mean.

THE law paffed under the same reign, which condemned every woman, who, having carried on a criminal commerce, did not declare it to the king before the married him, violated the regard due to natural modelty. It is as unreasonable to oblige a woman to make this declaration, as to oblige a man not to attempt the defence of his own life. It will be and more never in make the bearing

THE law of Henry II. which condemned the woman to death who loft her child, in case she did not make known her pregnancy to the magistrate, was not less contrary to self-defence. It would have been sufficient to oblige her to inform one of her nearest relations, who might watch over the prefervation of the child.

WHAT other information could the give in this fituation, fo torturing to natural modesty? Education has heightened the notion of preferving that

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modelty; and in those critical moments, scarce has she any idea remaining of the loss of life.

THERE has been much talk of a law in \* England, which allowed girls feven years old to chuse a husband. This law was shocking two ways; it had no regard to the time when nature gives maturity to the understanding, nor to that in which size gives maturity to the body.

Amongs the Romans, a father might oblige his daughter to repudiate + her husband, though he himself had consented to the marriage. But it is contrary to nature, for a divorce to be in the

power of a third person.

A DEVORCE can be agreeable to nature, only when it is by confent of the two parties, or at least of one of them: but when neither confents, it is a monstrous separation. In fine, the power of divorcement can be given only to those who seel the inconveniencies of marriage, and who are sensible of the moment when it is for their interest to make them cease.

#### CHAP. IV.

#### Continuation of the same Subject.

26: Investminion Colds weather, at rever trees a

UNDEBALD\* king of Burgundy decreed, that if the wife or fon of a person guilty of robbery did not reveal the crime, they were to become slaves. This law was contrary to nature: a wife to inform against her husband! a son to ac-

Mr. Bayle, in his Criticism on the History of Calvinism, speaks of this law, p. 263.

Law of the Burgundians, tit. 47.

cufe his father! to avenge one criminal action, they ordained another still more criminal.

THE law of Recessuinthus \* allows the children of the adultress, or those of her husband, to accuse her, and to put the slaves of the house to the torture. How iniquitous the law, which, to preserve a purity of morals, overturns nature, the origin, the source of all morality!

WITH pleasure we behold in our theatres a young hero express as much horror against the discovery of his mother-in-law's guilt, as against the guilt itself. In his surprize, though accused, judged, condemned, proscribed, and covered with insamy, he hardly dares to reslect on the abominable blood from whence Phædra sprang: he forsakes the most tender object, all that is most dear, all that lies nearest his heart, all that can fill him with rage, to deliver himself up to the unmerited vengeance of the gods. It is nature's voice, the sweetest of all sounds, that inspires us with this pleasure.

#### CHAP. V.

Cases in which we may judge by the Principles of the civil Law, in limiting the Principles of the Law of Nature.

to an manager out to test with

A N Athenian law obliged + children to provide for their fathers, when fallen into poverty; it excepted those who were born of a \* courtezan, those whose chastity had been infamous-

<sup>+</sup> In the code of the Visigoths, lib. 3. tit. 4, sect. 13.

<sup>+</sup> Under pain of infamy, another under pain of imprisonment.

Plutareh, life of Solon,

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ly prostituted by their father, and those to whom he had not given any means of gaining a livelithood.

THE law confidered, that, in the first case, the father being uncertain, he had rendered the natural obligation precarious; that in the feeond, he had fullied the life he had given, and done the greatest injury he could do to his children, in depriving them of their reputation; that in the third, he had rendered insupportable a life which had no means of fublistence. The law fuspended the natural obligation of children, because the father had violated his: it looked upon the father and the four as no more than two citizens, and determined, with regard to them, only from civil and political views; always confidering, that a good republic ought to have a particular regard to manners. I am apt to think, that Solon's law was a wife regulation in the first two cases, whether that in which nature has left the fon in ignorance with respect to his father, or that in which she even seems to ordain he should not own him; but it cannot be approved with regard to the third, where the father had only violated a civil institution.

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That the Order of Succession or Inheritance depends on the Principles of political or civil Law, and not on those of the Law of Nature.

Coina, that the authors of the empres ha

THE Vocanian law ordained, that no woman should be left heirest to an estate, not even if she was an only child. Never was there an un-

A Plutarch, life of Solon, and Gallienus in exhort, ad. art. c, 8.

juster law, says St. Augustine +. A formula of Marculfus + treats that custom as impious, which deprives daughters of the right of fucceeding to the estate of their fathers. Justinian \* gives the appellation of barbarous to the right which the males had formerly of fucceeding in prejudice to the daughters. These notions proceed from their having confidered the right of children to fucceed to their fathers possessions, as a consequence of the law of nature; which it is not.

THE law of nature ordains, that fathers shall provide for their children; but it does not oblige them to make them their heirs. The division of property, the laws of this division, and the fuccession after the death of the person who has bad this division, can be regulated only by the community, and of course by political or civil laws.

TRUE it is, that a political or civil order often demands that children should succeed to their father's estate; but it does not always make this neceffary. man and ability of tall to the bill the

THERE may be fome reasons given why the laws of our fiefs appoint that the eldest of the males, or the nearest relations of the male fide, should have all, and the females nothing: and why by the laws of the Lombards & the fifters, the natural children, the other relations; and, in their default, the treafury might share the inheritance with the daughters.

IT was regulated in some of the Dynasties of China, that the brothers of the emperor should suc-

De civitate Dei, lib. 4.

† Lib. 2. cap. 12.

aved attitle versengen

<sup>\*</sup> Novell. ar.

<sup>5</sup> Lib, 2. tit. 14. feet. 6, 7, and 8,

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ceed to the throne, and that the children should not. If they were willing that the prince should have a certain degree of experience, if they seared his being too young, and if it was become necessary to prevent ennuchs from placing children successively on the throne, they might very justly establish a like order of succession; and when some, writers have treated these brothers as usurpers they have judged only by ideas received from the laws of their own countries.

AGREEABLE to the custom of Numidia +, Defalces, brother of Gala, succeeded to the kingdom; not Massinissa, his son. And even to this day samong the Arabs in Barbary, where each village has its chief, they adhere to this ancient custom, by chusing the uncle, or some other relation, to succeed,

THERE are monarchies merely elective; and fince it is obvious, that the order of succession ought to be derived from the political or civil laws, it is for these to decide in what cases it is agreeable to reason, that the succession be granted to children, and in what cases it ought to be given to others.

In countries where polygamy is established, the prince has many children; and the number of them is much greater in some of these countries than in others. There are \* states, where it is impossible for the people to maintain the children of the so-

<sup>†</sup> Du Halde on the fecond Dynasty.

<sup>+</sup> Livy, Decad. 3. lib. 9.

<sup>§</sup> Shaw's Travels, vol. 1. p. 402.

<sup>\*</sup> See the collection of voyages that contributed to the establishment of an East-India company, vol. 4. part 1. pag. 114. And Mr. Smith's Voyage to Guinea, part 2: pag. 150. concerning the king-dom of Judia.

vereign: they might therefore make it a law, that the crown shall devolve, not on the king's children, but on those of his sister.

A LARGE number of children would expose the state to the most dreadful civil wars. The order of succession which gives the crown to the children of the sister, the number of whom is not larger than those of a prince who has only one wife, must prevent these inconveniencies.

THERE are people, amongst whom reasons of state, or some maxims of religion, have made it necessary that the crown should be always fixed in a certain family: from hence, in India, proceeds the jealousy of their \* tribes, and the sear of losing the descent: they have there conceived, that never to want princes of the blood-royal, they ought to take the children of the eldest sister of the king.

A GENERAL maxim: It is an obligation of the law of nature, to provide for our children; but to make them our fuccessors, is an obligation of the civil or political law. From hence are derived the different regulations, with respect to bastards, in the different countries of the universe; these are according to the civil or political laws of each country.

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See Edifying Letters, Let. 14. and the Voyages that contribut ed to the establishment of an East-India company, vol. 3. part 2, pag. 644.

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That we ought not to decide by the Precepts of Religion, what belongs only to the Law of Nature.

THE Abassines have a most severe lent of sifty days, which weakens them so much, that for a long time they are incapable of business: the Turks of do not fail to attack them after their lent. Religion ought, in favour of the natural right of self-defence, to set bounds to these customs.

THE Jews were obliged to keep the fabbaths but it was an instance of great stupidity in this nation, not to defend themselves when their enemies chose to attack them on this day.

CAMBUSES belieging Pelusium, set in the first rank a prodigious number of those animals which the Ægyptians regarded as facred; the consequence was, that the foldiers of the garrison durst not molest them. Who does not see that self-defence is a duty superior to every precept?

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That we ought not to regulate by the Principles of the canon Law, Things which should be regulated by those of the civil Law.

BY the 1 civil law of the Romans, he who took a thing privately from a facred place, was pu-

Leg. ff. ad leg. Juliam peculatus.

<sup>+</sup> Collection of Voyages that contributed to the establishment of zer East-Irdia company, vol. 4, pag. 35, and 103.

nished only for the guilt of thest: by the + canon law, he is punished for the crime of sacrilege. The canon law takes cognizance of the place; the civil law of the sact. But to attend only to the place, is neither to reslect on the nature and definition of a thest, nor on the nature and definition of sacrilege.

As the husband may demand a separation, on account of the infidelity of his wife; the wife might formerly + demand it, on account of the infidelity of the hufband. This cultom, contrary to a regulation made in the 1 Roman laws, was introduced into the ecclefiaffic courts", where nothing was regarded but the maxims of canon law; and indeed, if we confider marriage as athing merely spiritual, and as relating folely to the things of another life, the violation is in both cases the same. But the political and civil laws of almostall nations, have, with reason, made a distinction between them. They have required from the women a degree of referve and continency, which they have not exacted from the men; because, in women, a violation of chaftity supposes a renunciation of all virtue; because women, by violating the laws of marriage, quit the state of their natural dependence; because nature has marked the infidelity of women with certain figns; and, in a word, because the children of the wife born in adultery necessarily belong, and are an expence to the husband, while the children produced by the adultery of the husband, are not the wife's, nor are an expence to the wife.

<sup>+</sup> Capite quisquis 17. questione 4. Cujas observat, lib. 13, cap. 19,

<sup>\*</sup> Beaufmanair on the ancient customs of Beauvoisis, chap. 18.

<sup>1</sup> Law of the first Code ad leg. Juliam de adulteriis.

At present they do not take cognizance of these things in France.

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a and estat been one or girt of temperous That Things which ought to be regulated by the Principles of Givil Law, can feldom be regulated being the might cutify manner cuting added the health

HE laws of religion have a greater fublimity; the civil laws a greater extent. 19 1701

THE laws of perfection drawn from religion have more in view the goodness of the person that observes them, than of the fociety in which they are observed: the civil laws, on the other hand, have more in view the moral goodness of men in general, than that of individuals, then the shoots

THUS, ancient as those ideas are which immediately fpring from religion, theyought not always to ferve a first principle to the civil laws; because these have another, the general welfare of fociety.

THE Romans made regulations amongst themfelves, to preserve the morals of their women's these were political institutions. Upon the establishment of monarchy, they made civil laws on this head, and formed them on the principles of their civil government. When the Christian religion became predominant, the new laws that were then made, had less relation to the general rectitude of morals, than to the holiness of marriages they had less regard to the union of the two fexes in a civil, than in a spiritual state.

AT first, by the \* Roman law, a husband, who brought back his wife into his house, after the had been found guilty of adultery, was punished as an

Les separations profess. 4 Leg. 11. 5 ult. ff. ad leg. Juliam de adulteriis.

accomplice in her debauch. Justinian 1, from other principles, ordained, that during the space of two years he might go and take her again out of the

monastery.

FORMERLY, when a woman, whose husband was gone to war, heard no longer any tidings of him, she might easily marry again, because she had in her hands the power of making adivorce. The law of + Constantine obliged the women to wait four years, after which she might send the bill of divorce to the general; and, if her husband returned, he could not then charge her with adultery. But Justinian & decreed, that let the time be newer follong after the departure of her husband, she fhould not marry, unless by the deposition and oath of the general she could prove the death of her husband. Justinian had in view the indisfolubility of marriage; but we may fafely fay, that he had it too much in view. He demanded a politive proof, when a negative one was fufficient; he required a thing very difficult, to give an account of the fate of a man at a great distance, and expofed to fo many accidents; he prefumed a crime, that is, a defertion of the husband, when it was so natural to presume his death. He injured the commonwealth, by obliging women to live out of marriage; he injured individuals, by exposing them to numberless dangers.

THE law of Justinian + which ranked amongst the causes of divorce the consent of the husband and wife to enter into a monastery, was quite op-

had extracted wheather and the side and objected

i Nov. 134. Col. 9. cap, 10-tit, 170,

viling busing mad Leg. 7. de repudiis & judicio de morib. sublato.

Y Auth. hodie quantiscumque cod. de repudiis.

<sup>+</sup> Auth quod hodie cod, de repudiis,

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posite to the principles of the civil laws. It is natural that the causes of divorce should have their origin in certain impediments, which could not be foreseen before marriage; but this desire of preserving chastity might be foreseen, since it is in ourselves. This law favours inconstancy in a state, which is by its very nature perpetual; it shocks the fundamental principle of divorce, which permits the dissolution of one marriage only from the hope of another. In short, if we view it in a religious light, it is no more than giving victims to God without a facrisce.

#### donne de C. H. W. B. a. X. Serus pe unap

In what Case we ought to follow the civil Law, which permits, and not the Law of Religion, which forbids.

my is introduced into a country where it is allowed, we cannot believe, (speaking only as a politician) that the laws of the country ought to suffer a man who has many wives to embrace this religion; unless the magistrate or the husband should indemnify them, by restoring them some way or other to their civil state. Without this, their condition would be deplorable; no some would they obey the laws, than they would find themselves deprived of the greatest advantages of society.

Rinchion of this land can have no relation to have mile with being the color of the

#### redicate the principles of the ignillarist he is tosind by a block H A P. XI to at a distant

That human Courts of Justice should not be regulated by the Maxims of those Tribunals which relate to the other Life.

THE tribunal of the inquisition, formed by the - Christian monks on the idea of the tribunal of penitence, is contrary to all good policy. has every where met with a general dislike, and must have funk under the oppositions it met with, if those who were resolved to establish it, had not drawn advantages even from these oppositions.

THIS tribunal is insupportable in all governments. In monarchies, it only makes informers and traitors; in republics, it only forms dishonest men; in a despotic state, it is as destructive as the government itself.

#### WWW HRE adiaton which enclines mines interior vitate C H A Pro XII. van

# Continuation of the same Subject.

delicate distriction and

toders man who has many TIT is one abuse of this tribunal, that of two perfons accufed of the fame crime, he who denies. is condemned to die; and he who confesses avoids the punishment. This has its fource in monastic ideas, where he who denies, feems in a state of impenitence and damnation; and he who confesses, in a flate of repentance and falvation. But a distinction of this kind can have no relation to human tribunals. Human justice, which sees only the actions, has but one compact with men, namely, that of innocence; divine justice, which fees the

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#### CHAP. XIII.

In what Cases, with respect to Marriages, we ought to follow the Laws of Religion; and in what Cases we should follow the civil Laws.

I Thas happened in all ages and countries, that religion has been blended with marriages. When certain things have been confidered as impure or unlawful, and were nevertheless become necessary, they were obliged to call in religion, to legitimate in the one case, and to reprove in others.

On the other hand, as marriage is of all human actions that in which fociety is most interested, it became proper that this should be regulated by the civil laws.

EVERY thing which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulness it occasions, which has made all nations consider it as the object of a particular benediction; a benediction which, not being always annexed to it, is supposed to depend on certain superior graces; all this, I say, is within the resort of religion.

THE consequences of this union, with respect to property, the reciprocal advantages, every thing which has a relation to the new family, to that from which it forung, and to that which is expected to arise; all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty which attends unlawful conjunctions, religion here stamps its seal, and the

As described and when the second of which the

civil laws join theirs to it; in order that it may be as authentic as possible. Thus, besides the conditions required by religion to make a marriage valid, the civil laws may still exact others.

THE civil laws receive this power from their being additional obligations, and not contradictory ones. The law of religion infifts upon certain ceremonies, the civil laws on the confent of fathers; in this case, they demand something more than that of religion, but they demand nothing contrary to it.

Ir follows from hence, that the religious law must decide whether the bond be indisfoluble, or not; for if the laws of religion had made the bond indisfoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws, with regard to marriage, are not absolutely necessary; such are those established by the laws, which, instead of annulling the marriage, only punish those who contract it.

A MONGET the Romans, the Papian law declared those marriages illegal which had been prohibited, and yet only subjected them to a penalty; but a Senatus Consultum, made at the instance of the emperor Marcus Antoninus, declared them void; there then no longer subsisted + any such thing as a marriage, wise, dowry, or husband. The civil laws determine according to circumstances: sometimes they are most attentive to repair the evil; at others, to prevent it:

See what has been said on this subject, in book 23. chap. 27, in the relation they bear to the number of inhabitants.

<sup>+</sup> See Law 16. ff. de ritu nuptiarum ; and Law 3. § 1, also Digest. de donationibus inter virum & uxorem.

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In what Instances Marriages between Relations

Should be regulated by the Laws of Nature; and
in what Instances by the civil Laws.

age between relations, it is a thing extremely delicate, to fix exactly the point at which the laws of nature stop, and where the civil laws begin. For this purpose, we must establish some principles.

THE marriage of the son with the mother confounds the state of things; the son ought to have an unlimited respect to his mother, the wise an unlimited respect for her husband; therefore the marriage of the mother to her son, would subvert the natural state of hoth.

Besides, nature has forewarned in women the time in which they are able to have children, but has retarded it in men; and, for the fame reason, women sooner lose this ability, and men later. If the marriage between the mother and the son were allowed, it would almost always be the case, that when the husband was capable of entering into the views of nature, the wife would be incapable.

THE marriage between the father and the daughter is contrary to nature, as well as the other; but it is not less contrary, because it has not these two obstacles. Thus the Tartars, who may marry their.

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This law is very ancient amongst them. Attila, fays Prifeus in his embassy, stopt in a certain place to marry Esca his daughter. A thing allowed, he adds, by the laws of the Scythians, pag. 32.

daughters, never marry their mothers, as we fee in the accounts we have of that nation .

It has always been the natural duty of fathers to watch over the chaftity of their children. Intrusted with the care of their education, they are obliged to preferve the body in the greatest perfection, and the mind from the least corruption; to encourage whatever has a tendency to inspire them with virtuous desires, and to nourish a becoming tenderness. Fathers, always employed in preserving the morals of their children, must have a natural aversion to every thing that can render them corrupt. Marsiage, you will say, is not a corruption: but before marriage they must speak, they must make their persons beloved, they must seduce: it is this seduction which ought to inspire us with horror.

THERE should be therefore an unsurmountable barrier between those who ought to give the education, and those who are to receive it; in order to prevent every kind of corruption, even though the motive be lawful. Why do fathers so carefully deprive those who are to marry their daughters, of their company and familiarity?

their company and familiarity?

The horror that arises against the incest of the brother with the lister, should proceed from the same source. The desire of fathers and mothers to preserve the morals of their children and families untainted, is sufficient to inspire their offspring with an abhorrence of every thing that can lead to

the union of the two fexes.

THE prohibition of marriage between confingermans, has the fame original. In the early ages, that is, in the times of innocence; in the ages.

<sup>4</sup> Hift; of the Tartars, part 3. pag. 236.

when luxury was unknown, it was customary for children\*, upon their marriage, not to remove from their parents, but to settle in the same house; as a small habitation was at that time sufficient for a large family: the children † of two brothers, or cousin-germans, were considered both by others and themselves as brothers. The estrangement then between the brothers and sisters, as to marriage\*, subsisted likewise between the cousin-germans.

THESE principles are so strong and so natural, that they have had their influence almost over all the earth, independently of any communication. Is was not the Romans who taught the inhabitants of Formosa \*, that the marriage of relations of the fourth degree was incestuous: it was not the Romans that communicated this sentiment to the A-rabs \*: it was not they who taught it to the inhabitants of the Maldivian islands §

Burn if some nations have not rejected marriages between fathers and children, listers and brothers; we have seen in the first book, that intelligent beings do not always follow the law of nature. Who could have imagined it? Religious ideas have often made men fall into these mistakes. If

lording and are are the contract contract of

<sup>\*</sup> It was thus amongst the ancient Romans.

<sup>+</sup> Amongst the Romans they had the same name, the consin-germans were called brothers.

<sup>&#</sup>x27;It was thus at Rome in the first ages, till the people made a law to permit them; they were willing to favour a man extremely popular, who had married his coulin german. Plutarch's Treatife, inti-tled. Questions concerning the assairs of the Romans.

<sup>+</sup> Collection of Voyages to the Judies, vol. 5. part r. An account of the Rate of the ille of Formofal and the state of the ille of the ill

Koran, chap. of Women.

See Francis Pirrard.

the Affyrians and the Persians married their mothers, the first were influenced by a religious respect for Semiramis; and the second did it, because the religion of Zoroaster gave a preserence + to these marriages. If the Ægyptians married their sisters, it proceeded from the wildness of the Ægyptian religion, which consecrated these marriages in honour of Isis. As the spirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural, from its being consecrated by a false religion.

THE principle which informs us that marriages between fathers and children, between brothers and fifters, are prohibited, in order to preserve natural modesty in families, will help us to the discovery of those marriages that are prohibited by the law of nature, and of those which can be so only by the civil law.

As children dwell, or are supposed to dwell, in their father's house, and of course the son-in-law with the mother-in-law, the father-in-law with the daughter-in-law, or wise's daughter; the marriage between them is forbidden by the law of nature. In this case the resemblance has the same effect as the reality, because it springs from the same cause: the civil law neither can, nor ought to allow these marriages.

THERE are nations, as we have already observed, amongst whom cousin-germans are considered as brothers, because they commonly dwell in the same house: there are others, where this custom is not known. Among the first, the marriage of

<sup>†</sup> They were considered as more honourable. See Philo, de specialibus legib, quapertineat ad pracepta decalogie Paris, 1640, pag, 778

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coufin-germans ought to be regarded as contrary to nature; not so among the others.

Bur the laws of nature cannot be local. Therefore, when these marriages are forbidden, or allowed, they are, according to the circumstances,

permitted or forbidden by a civil law.

IT is not a necessary custom for the brother-inlaw and the fifter-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or allows it, is not a law of nature, but a civil law, regulated by circumstances, and dependent on the customs of each country: these are cafes in which the laws depend on the morals, or customs of the inhabitants.

THE civil laws forbid marriages, when by the customs received in a certain country they are found to be in the same circumstances as those forbidden by the laws of nature; and they allow them when this is not the case. The prohibitions of the laws of nature are invariable, because the thing on which they depend is invariable; the father, the mother, and the children, necessarily dwell in the fame house. But the prohibitions of the civil laws are accidental, because they depend on anaccidental circumstance; cousin-germans and others dwelling in the house by accident.

THIS explains why the laws of Moses, those of the Ægyptians +, and of many other nations, permitted the marriage of the brother-in-law with the fifter in-law; whilft these very marriages were difallowed by other nations, a book addie advelumed

In the Indies they have a very natural reason for allowing this fort of marriages. The uncle is

<sup>+</sup> See Law 8, of the Code de incestis & inutilibus nuptiis.

there considered as the father, and is obliged to maintain and educate his nephew, as if he were his own child: this proceeds from the disposition of these people, which is good-natured and full of humanity. This law, or this custom, has produced another; if a husband has lost his wife, he does not fail to marry her sister; which is extremely natural, for his new consort becomes the mother of her sister's children, and not a cruel step-mother.

#### CHAP. XV.

That we should not regulate by the Principles of political Law, those Things which depend on the Principles of civil Law.

S men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.

By the first, they acquired liberty; by the second, property. We should not decide by the laws of liberty, which, as we have already observed, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism, to say that the good of the individual should give way to that of the public: this can never take place, but when the government of the community, or, in other words, the liberty of the subject, is concerned; this does not affect such cases as relate to private property, because the public good confists in everyone's having that property, which was given him by the civil laws, invariably preserved.

CICERO maintains, that the Agrarian laws were

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unjust; because the community was established with no view, but that every one might be able to pre-

ferve his property.

LET us therefore lay down as a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigour of the civil law, which is the Palladium of property.

THUS when the public has occasion for the eflate of an individual, it ought never to act by the rigour of political law: it is here that the civil law ought to triumph, who with the eyes of a mother regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it: the public is in this respect like an individual, who treats with an individual. It is full enough that it can oblige a citizen to fell his inheritance, and that it can strip him of this great privilege which he holds from the civil law, the not being forced to alienate his possessions.

AFTER the nations which subverted the Roman empire had abused their very conquests, the spirit of liberty recalled them to that of equity. They exercised the most barbarous laws with moderation: and if any one should doubt the truth of this, they need only read Beaumanoir's excellent work on jurisprudence, written in the twelsth century.

THEY mended the highways in his time, as we do at present. He says, that when a highway could not be repaired, they made a new one as near the

/ Vol. III.

old as possible; but indemnified the proprietors at the \* expence of those who reaped any advantage from the road. They determined at that time by the civil law; in our days, we determine by the law of politics.

#### CHAP. XVI.

That we ought not to decide by the Rules of the civil Law, when it is proper to decide by those of the political Law.

OST difficulties on this subject may be easily solved, by not confounding the rules derived from property with those which spring from liberty.

Is the demesse of a state or government alienable, or is it not? This question ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, because it is as necessary that there should be demessed from the subsistence of a state, as that the state should have civil laws to regulate the disposal of property.

If then they alienate the demesne, the state will be forced to make a new fund for another. But this expedient overturns the political government, because, by the nature of the thing, for every demesne that shall be established, the subject will always be obliged to pay more, and the monarch to receive less; in short, the demesne is necessary, and the alienation is not.

The lord appointed collectors to receive the toll from the peafant, the gentlemen were obliged to contribute by the count, and the clergy by the bishop. Beaumanoir, chap. 22.

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THE order of succession is, in monarchies, founded on the welfare of the state; this makes it necessary that such an order should be fixed, to avoid the missortunes, which, I have said, must arise in a despotic kingdom, where all is uncertain, because all is arbitrary.

THE order of fuccession is not fixed for the sake of the reigning family; but because it is the interest of the state, that it should have a reigning family. The law which regulates the succession of individuals, is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy, is a political law, which has in view the welfare and preservation of the kingdom.

Ir follows from hence, that when the political law has established an order of succession in government, and this order is at an end, it is absurd to reclaim the succession in virtue of the civil law of any nation whatsoever. One particular society does not make laws for another society. The civil laws of the Romans are no more applicable than any other civil laws. They themselves did not make use of them, when they proceeded against kings: and the maxims by which they judged kings are so abominable, that they ought never to be revived.

It likewise follows from hence, that when the political law has obliged a family to renounce the succession, it is absurd to insist upon the restitutions drawn from the civil law. Restitutions are in the law, and may be good against those who live in the law: but they are not proper for such as have been raised up for the law, and who live for the law.

Ir is foolish to pretend to decide the rights of

kingdoms, of nations, and of the whole globe, by the fame maxims on which (to make use of an expression of \* Cicero) we should determine the right of a gutter between individuals.

#### CHAP. XVII.

STR ACISM ought to be examined by the rules of politics, and not by those of the civil law; and so far is this custom from rendering a popular government odious, that it is, on the contrary, vastly well adapted to prove its lenity. We should be sensible of this ourselves, if, while banishment is always considered amongst us as a penalty, we were able to separate the idea of ostracism from that of punishment.

ARISTOTLE + tells us, it is univerfally allowed, that this practice has fomething in it both humane and popular. If in those times and places where this sentence was executed, they sound nothing in it that appeared odious; is it for us, who see things at such a distance, to think otherwise than the accuser, the judges, and the accused themselves?

AND if we consider that this judgment of the people loaded the person with glory on whom it was passed; that when at Athens it fell upon a man without † merit, from that very moment they ceased to § use it; we shall find that numbers of

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<sup>#</sup> Lib. 1, of Laws.

<sup>\*</sup> Repub. lib. 3. cap. 13.

<sup>+</sup> Hyperbolus. See Plutarch, life of Ariflides.

<sup>5</sup> It was found opposite to the spirit of the legislator.

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people have entertained a false idea of it; for it was an admirable law that could prevent the ill consequences which the glory of a citizen might produce, by loading him with new glory.

#### CHAP. XVIII.

That it is necessary to enquire, whether the Laws which seem contradictory, are of the same Class.

A T Rome the husband was allowed to lend his wife to another. Plutarch tells us this \* in express terms. We know that Cato lent his † wife to Hortensius, and Cato was not a man to violate the laws of his country.

On the other hand, a husband who suffered his wife to be debauched, who did not bring her to justice, or who took her again after her & condemnation, was punished. These laws seem to contradict each other, and yet are not contradictory. The law which allowed a Roman to lend his wife, was visibly a Lacedæmonian institution, established with a view of giving the republic children of a good species, if I may be allowed the term: the other had in view the preservation of morals. The first was a law of politics, the second a civil law.

<sup>·</sup> Plutarch, in his comparison between Lycurgus and Numa.

<sup>+</sup> Plutarch, life of Cato.

<sup>&</sup>amp; Leg. 11. feft, ult. ff. ad leg. Jul. de adulteriis.

#### CHAP. XIX.

That we should not decide those Things by the civil Law, which ought to be decided by domestic Laws.

THE law of the Visigoths enjoins, that the flaves of the house shall be obliged to bind the man and woman they surprize in adultery, and to present them to the husband and to the judge: a terrible law, which puts into the hands of such mean persons the care of public, domestic and private vengeance!

This law can be no where proper but in the feraglio's of the east, where the slave who has the charge of the inclosure, is deemed an accomplice upon the discovery of the least insidelity. He seizes the criminals, not so much with a view to bring them to justice, as to do justice to himself, and to obtain a scrutiny into the circumstances of the action, in order to remove the suspicion of his negligence.

Bur, in countries where women are not guarded, it is absurd to subject those who govern the family, to the inquisition of their slaves.

This inquifition may, in certain cases, be at the most a particular domestic regulation, but never a civil law.

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I Law of the Viligoths, lib. 3. tit, 4. fect. 6.

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#### CHAP. XX.

That we ought not to decide by the Principles of the civil Laws, those Things which belong to the Law of Nations.

IBERTY chiefly confifts in not being forced to do a thing, where the laws do not oblige: people are in this flate only as they are governed by civil laws; and because they live under

those civil laws, they are free.

IT follows from hence, that princes who live not among themselves under civil laws, are not free; they are governed by force; they may continually force, or be forced. From hence it follows, that treaties made by force are as obligatory as those made by free consent. When we who live under civil laws, are, contrary to law, constrained to enter into a contract, we may, by the affiftance of the law, recover from the effects of violence: but a prince, who is always in that state in which he forces, or is forced, cannot complain of a treaty which he has been compelled to fign. This would be to complain of his natural state; it would seem as if he would be a prince with respect to other princes, and as if other princes should be subjects with respect to him; that is, it would be contrary to the nature of things. and the state of the

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#### CHAP. XXI.

That we should not decide by political Laws, Things which belong to the Law of Nations.

POLITICAL laws require, that every man be subject to the natural and civil courts of the country where he resides, and to the censure

of the prince.

THE law of nations requires, that fovereigns shall fend ambassadors; and a reason drawn from the nature of things does not fuffer these ambassadors to depend either on the prince, to whom they are fent, or on his tribunals. They are the voice of the fovereign who fends them, and this voice ought to be free; no obstacle should prevent the execution of their office; they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused, if they were liable to be punished for crimes; if they could be arrefted for debts, these might be forged. Thus a prince, who has naturally a bold and enterprizing spirit, would speak by the mouth of a man who had every thing to fear. We must then be guided, with regard to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who becomes either their judge or their accomplice.

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# CHAP. XXII.

The miserable State of the Ynca Athualpa.

The Ynca Athualpa \* could not be tried by the law of nations; they tried him by political and civil laws; they accused him for putting to death some of his own subjects, for having may wives, &c. and to fill up the measure of their stupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

## C H A P. XXIII.

That when, by some Circumstance, the political Law becomes destructive to the State, we ought to decide by such a political Law as will preserve it, which frequently becomes a Law of Nations.

HEN that political law which has established in the kingdom a certain order of fuccession, becomes destructive to the body politic for whose sake it was established, there is not the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first, it would in the main be entirely conformable to it, since both would depend on this principle, that, The safety of the People is the supreme Law.

is look on inputs a hind bit \*.

See Garcilaffo de la Vega.

I HAVE faid \*, that a great state becoming accessory to another, is itself weakened, and even weakens the principal. We know, that it is for the interest of the state to have the supreme magistrate within itself, that the public revenues be well administered, and that its specie be not fent abroad to enrich another country. It is of importance, that he who is to govern, has not imbibed foreign maxims: these are less agreeable than those already established. Besides, men have an extravagant fondness for their own laws and customs: these constitute the happiness of every community; and, as we learn from the histories of all nations, are rarely changed without violent commotions, and a great effusion of blood.

FROM hence it follows, that if a great state has to its heir the possessor of a great state, the former may reasonably exclude him, because a change in the order of succession must be of service to both countries. Thus a law of Russia, made in the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown every heir who possessed another monarchy; thus the law of Portugal disqualifies every stranger, who lays claim

to the crown by right of blood.

But if a nation may exclude, it may with greater reason be allowed a right to oblige a prince to renounce. If the people fear that a certain marriage will be attended with fuch confequences, as shall rob the nation of its dependence, or dismember some of its provinces, it may very justly oblige the contractors and their descendants to renounce all right over them; while he who renounces, and

<sup>\*</sup> See book 5. chap. 14. book 8. chap. 16, 17, 18, 19, and 20. book 9, chap, 4, 5, 6, and 7. and book 10. chap. 9 and 10.

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those to whose prejudice he renounces, have the less reason to complain, as the state might originally have made a law to exclude them.

#### C H A P. XXIV.

That the Regulations of the Police are of a different Class from other civil Laws.

THERE are criminals, whom the magistrate punishes, there are others whom he reproves. The former are subject to the power of the law, the latter to his authority: those are cut off from society; these they obliged to live according to the rules of society.

In the exercise of the Police, it is rather the magistrate who punishes, than the law; in the sentence past on crimes, it is rather the law which punishes, than the magistrate. The business of the Police confifts in affairs which arife every moment, and are generally of a triffing nature: there is then but little need of formalities. The actions of the Police are quick; they are exercised over things which teturn every day; it would be therefore improper for it to inflict fevere punishments. It is constantly employed about minute particulars; great examples are therefore not defigned for its purpofe. It is governed rather by regulations than laws; those who are subject to its jurisdiction, are continually under the eye of the magistrate: it is therefore his fault if they fall into excess. Thus we eught not to confound a flagrant violation of the laws with a simple breach of the Police; these things: are of a different order.

FROM hence it follows, that the laws of an Ita-

lian \* republic, where bearing fire-arms is punished as a capital crime, and where it is not more fatal to make an ill use of them, than to carry them, is not agreeable to the nature of things.

IT follows, moreover, that the applauded action of that emperor, who caused a baker to be empaled whom he found guilty of a fraud, was the action of a sultan, who knew not how to be just, without committing an outrage on justice.

#### CHAP. XXV.

That we should not follow the general Disposition of the civil Law, in Things which ought to be subject to particular Rules drawn from their own Nature.

Is it a good law, that all civil obligations passed between sailors in a ship in the course of a voyage should be null? Francis Pirard † tell us, that in his time it was not observed by the Portuguese, though it was by the French. Men who are together only for a short time; who have no wants, since they are provided for by the sovereign; who have only one object in view, that of their voyage; who are no longer in society, but are only the inhabitants of a ship, ought not to contract obligations that were never introduced, but to support the burthen of civil society.

In the same spirit was the law of the Rhodians, made at a time when they always followed the coasts; it ordained, that those who remained in a vessel during a tempest, should have ship and cargo, and those who quitted it should have nothing.

<sup>#</sup> Venice.

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### С н А Р. 1.

Of the Original and Revolutions of the Roman Laws.
on Successions.

minima de la libraria

THIS affair derives its establishment from the most distant antiquity; and to penetrate to its foundation, allow me to search among the first laws of the Romans, for what, I believe, no body yet has been so happy as to discover.

WE know that Romulus divided the land of his small kingdom among his subjects; it seems to me, that from hence were derived the laws of Rome on successions.

THE law of the division of lands made it necessary, that the property of one family should not pass into another: from hence it followed, that there were but two orders of heirs established by law+, the children and all the descendants that lived under the power of the father, whom they called sui baredes, or his natural heirs; and, in their default, the nearest relations on the male side, whom they called agnati.

IT followed likewife, that the relations on the

Dionyf. Halicar. lib. 2. c. 3. Plutarch, comparison between Numa and Lycurgus.

<sup>+</sup> Aft si intestato moritur cui suus heres nec extabit, agnatus proximus samiliam habeto. Fragment of the law of the twelve Tables in Ulpian, the last title.

female fide, whom they called cognati, ought not to fucceed; they would have conveyed the estate into another family, which was not allowed.

FROM thence also it followed, that the children ought not to succeed to the mother, nor the mother to her children; for this might carry the estate of one family into another. Thus we see them excluded \* by the law of the twelve Tables; it called none to the succession but the agnati, and there was no agnation between the son and the mother.

But it was indifferent whether the fuus hares, or, in default of such, the nearest by agnation, was male or semale; because, as the relations on the mother's side could not succeed, though a woman who was an heiress should happen to marry, yet the estate always returned into the samily from whence it came. On this account, the law of the twelve Tables does not distinguish, whether the person t who succeeded was male or semale.

This was the reason, that though the grandchildren by the son succeeded to the grandsather, the grandchildren by the daughter did not succeed; for, to prevent the estate from passing into another samily, the agnati were preferred before them. Hence, the daughter, and not her & children, succeeded to the father.

Thus amongst the primitive Romans, the women succeeded, when this was agreeable to the law of the division of lands; and they did not succeed, when this law might suffer by it.

Such were the laws of succession among the pri-

See the Fragm, of Ulpian, fect. 8, tit. 26. Inft. tit, 3, in premie ad S. C. Tertallianum,

<sup>+</sup> Pantus, 1. 4. fent, tir, 8. fect. 3.

<sup>5</sup> Inft. tit, lib. 3.

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mitive Romans; and as thefe had a natural dependence on the constitution, and were derived from the division of lands, it is easy to perceive, that they had not a foreign original, and were not of the number of those brought into the republic by the deputies fent into the cities of Greece.

DIONYSIUS Halicarnaffeus tells us \*, that Servius Tullus finding the laws of Romulus and Numa on the division of lands abolished, he restored them, and made new ones, to give the old a greater weight. We cannot therefore doubt, but that the laws we have been speaking of, made in confequence of this division, were the work of these three Roman legislators.

THE order of fuccession having been established in confequence of a political law, no citizen was permitted to break in upon it by his private will; that is, in the first ages of Rome, he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions for the and a lo profile end line when

THEY therefore found a method of reconciling. in this respect, the laws with the defires of the individual. He was allowed to dispose of his subftance, in an affembly of the people; and thus ev very testament was, in some fort, an act of the le giflative power and a time to the power selfing for

THE law of the twelve Tables permitted the person who made his will, to chuse which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed ab intestate, was the law of the division of lands; and the reason why

<sup>#</sup> Lib. 4. pag. 276.

they extended so widely the power of the testator, was, that as the father might + sell his children, he might with greater reason deprive them of his substance. These were therefore different effects, since they flowed from different principles; and such is, in this respect, the spirit of the Roman laws.

THE ancient laws of Athens did not permit a citizen to make a will. Solon \* allowed it, with an exception to those who had children: and the legislators of Rome, filled with the idea of paternal power, allowed the making a will even to the prejudice of their children. It must be confessed, that the ancient laws of Athens were more confiftent than those of Rome. The indefinite permission of making a will, which had been granted to the Romans, destroyed by little and little the political regulation on the divisions of lands: it was the chief thing that introduced the fatal difference between riches and poverty: many fhares were united in the same person; some citizens had too much, and a multitude of others had nothing. Thus the people being constantly deprived of their shares, were incessantly calling out for a new diftribution of lands. They demanded it in an age, when the frugality, the parfimony, and the poverty of the Romans, were their diftinguishing characteristic; as well as at a time when their luxury. was become still more furprizing.

TESTAMENTS being properly a law made in the affembly of the people, those who were in the ar-

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<sup>†</sup> Dionysius Halicarnasseus proves, by a law of Numa, that the law which permitted a father to fell his for three times, was made by Romulus, and not by the Decemvirs. Lib. 2.

<sup>·</sup> See Plutarch, life of Solon.

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my were thereby deprived of a testamentary power. The people therefore gave the soldiers the privilege + of making before their companions, the dispositions which \* should have been made before them.

THE great affembly of the people met but twice a year; besides, both the people and the affairs brought before them were increased: they therefore judged it convenient to allow all the citizens to make their † will before some Roman citizens of ripe age, who were to represent the body of the people: they took sive § citizens, in whose presence the inheritor ¶ purchased his family, that is, his inheritance of the testator; another citizen brought a pair of scales to weigh the value; for the Romans \*, as yet, had no money.

To all appearance these five citizens were to represent the five classes of the people; and they set no value on the fixth, as being composed of menwho had no property.

WE ought not to fay, with Justinian, that these fales were merely imaginary; they became, indeed, imaginary in time, but were not so originally. Most of the laws which afterwards regulated wills,

<sup>†</sup> This testament, called in procincia, was different from that which they stilled military, which was established only by the constitutions of the emperors. Leg. 1. If. de militari testamento. This was one of the artifices by which they cajoled the foldiers.

<sup>\*</sup> This testament was not in writing, and it was without formality, fine libra & tabulis, as Cicero says, lib. 1. de Oratore.

<sup>+</sup> Intlitut. lib. 2. tit, 10. fect. 1. Aulus Gellius, lib. 15, cap. 27.
They called this form of testament per as & libram.

S. Ulpian, tit. 10. fect. 2.

Theoph. Inft, lib. 2. tit. 10.

T. Livy, lib. 4. nondum argentum signatum erat. He speaks of the time of the siege of Veil.

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were built on the reality of these sales: we find sufficient proof of this in the fragments of Ulpian\*. The deaf, the dumb, the prodigal, could not make a will; the deaf, because he could not hear the words of the buyer of the inheritance; the dumb, because he could not pronounce the terms of nomination; the prodigal, because he was excluded from the management of all affairs, he could not sell his inheritance. I omit any farther examples.

WILLS being made in the affembly of the people, were rather the acts of political than of civil laws, a public rather than a private right; from whence it followed, that the father, while his fon was under his authority, could not give him leave

to make a will.

AMONG most nations, wills are not subject to greater formalities than ordinary contracts: because both the one and the other are only expressions of the will of him who makes the contract, and both are equally a private right. But, among the Romans where testaments were derived from the public law, they were attended with much greater formalities, than other affairs; and this is still the case in those provinces of France, which are governed by the Roman law.

TESTAMENTS being, as I have faid, a law of the people, they ought to be made with the force of a command, and in such terms as are called direct and imperative. Hence a rule was formed, that they could neither give nor transmit an inheritance, without using the imperative words: from whence it followed, that they might very justly in

<sup>4</sup> Tit. 20. fect. 13.

<sup>\*</sup> Inflit. lib. 2. tit. 10, fect. 1.

<sup>+</sup> Let Titius be my heir,

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CHAPARADO OF IN A W S. H. certain cases make a substitution (; and ordain, that the inheritance should pass to another heir but that they could never make a fiduciary bequeft T. that is, charge any one in terms of intreaty to reftore an inheritance, or a part of it, to another. WHEN the father neither instituted his fon his

heir, nor difinherited him, the will was annulled; but it was valid, though he did not difinherit his daughter, nor institute her his heires. The reafon is plain: when he neither instituted nor difinherited his fon, he did an injury to his grandfon, who might have succeeded ab inteffato to his father; but in neither instituting nor disinheriting his daughter, he did no injury to his daughter's children, who could not fucceed ab intestate to their mother \*, because they were neither fui haredes, nor agnati. When a golf a the or behaving

THE laws of the ancient Romans concerning fuccessions being formed with the same spirit which dictated the division of lands, did not fusiciently restrain the riches of women; thus a door was lest open to luxury, which is always inseparable from this kind of opulence. Between the fecond and third Punic war, they began to perceive the evil, and made the Voconian + law: but as they were induced to this by the most important confiderations; as but few monuments have reached us that

<sup>§</sup> Vulgar, pupillary, and exemplary.

Augustus, for particular reasons, first began to authorise the fiduciary bequest, which in the Roman law was called fidei commission. Instit. lib. 2. tit. 23. in præmio.

<sup>\*</sup> Ad liberos matris intestate. Lib. 12. Tab. non pertinebat, quia famine suos baredes non babent. Ulpian, Fragm. tit. 26. fect. 7.

<sup>†</sup> It was proposed by Quintus Voconius, tribune of the people. See Cicero's second oration against Verres. In the Epitome of T. Livy lib. 41. we should read Voconius, instead of Volumnius.

take notice of this law; and as it has hitherto been spoken of in a most confused manner, I shall endeavour to clear it up.

CICERO has preserved a fragment, which forbids the instituting a woman an \* heires, whether she was married or unmarried.

THE Epitome of Livy, where he speaks of this law, says + no more: it appears from & Cicero and St. Augustin, that the daughter, though an only child, was comprehended in the prohibition.

CATO the elder | contributed all in his power, to get this law passed. Aulus Gellius cites a fragment of a speech, which he made on this occafion. By preventing the succession of women, his
intent was to take away the source of luxury: as
by undertaking the defence of the Oppian law, he
intended to put a stop to luxury itself.

In the Institutes of Justinian + and Theophilus •, mention is made of a chapter of the Voconian law, which limits the power of bequeathing. In reading these authors, every body would imagine, that this chapter was made to prevent the inheritance from being so exausted by legacies, as to render it unworthy of the heir's acceptance. But this was not the spirit of the Voconian law. We have just seen, that they had in view the preventing wo-

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<sup>\*</sup> Sanxit . . . , ne quis heredem virginem neve mulierem faceret.

Cicero's fecond Oration against Verres.

<sup>†</sup> Legem tulit, ne quis baredem mulierem institueret. Lib. 41.

S. Second Oration against Verres.

of the City of God, lib. 3.

Epitome of Livy, lib. 40.

<sup>4</sup> Lib. 27. cap. 6.

<sup>+</sup> Inftit, lib. 3, tit, as. allusted is talen yf alleg to zew if a

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is e men from inheriting an estate. The article of this law, which set bounds to the power of bequeathing, entered into this view: for if people had been possessed of the liberty to bequeath as much as they chused, the women might have received as legacies, what they could not receive by succession.

THE Voconian law was made to prevent the women from growing too wealthy; for this end it was necessary to deprive them of large inheritances, and not of such as were incapable of supporting luxury. The law fixed a certain sum, to be given to the women whom it deprived of the succession. Cicero \*, from whom we have this particular, does not tell us what was the sum; but Dio informs us †, it was a hundred thousand sessees.

THE Voconian law was made to regulate opulence, not to lay a restraint upon poverty; hence Cicero & informs us, that it related only to those whose names were registered in the censors books.

This furnished a pretence for cluding the law; it is well known that the Romans were vastly fond of set forms; and we have already taken notice, that it was the spirit of the republic to follow the letter of the law. There were fathers who would not give in their names to be enrolled by the cenfors, because they would have it in their power to leave the succession to a daughter; and the prætors determined, that this was no violation of the Voconian law, since it was not contrary to the letter of it.

<sup>\*</sup> Nemo censuit plus Fadiz dandum, quam posset ad eam lege Voconia pervenire. De finibus boni & mali, lib. 6.

<sup>†</sup> Cum lege Voconia mulicribus prohiberetur, ne qua majorem centum millibus nummum hæreditatem posset adire. Lib. 56.

S Qui census esfet. Second Oration against Verres.

ONE Anius Asellus had appointed his daughter his sole heir and executrix. He had a right to make this disposition, says Cicero +; he was not restrained by the Voconian law, since he was not included in the census. Verres, during the time of his prætorship, had deprived Anius's daughter of the succession; and Cicero maintains that Verres had been bribed, otherwise he would not have annulled a disposition which all the other prætors had confirmed.

What fort of citizens then must those have been, who were not registered in the census, in which all the freemen of Rome were included? According to the institution of Servius Tullius, mentioned by Dionysius of Halicarnasseus \*, every citizen not enrolled in the census became a slave: even Cicero himself † remarks, that such a man forseited his liberty: and the same thing is affirmed by Zonaras. There must have been therefore a difference between not being in the census according to the spirit of the Voconian law, and not being in it according to the spirit of Servius Tullius's institutions.

THEY whose names were not registered in the five first classes, in which the inhabitants ranked in proportion to their fortunes, were not comprized in the census § according to the spirit of the Vocanian law: they who were not enrolled in one of these fix classes, or who were not ranked by the censors among such as were called ararii, were not

<sup>+</sup> Genfus non erat. Second Oration against Verres.

<sup>\*</sup> Lib. 4.

<sup>+</sup> In oratione pro Cæcina.

<sup>§</sup> These five first classes were so considerable, that authors sometimes mention no more than five.

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included in the census, according to the spirit of Servius's institutions. Such was the force of nature, that to elude the Voconian law, fathers fubmitted to the difgrace of being confounded in the fixth class with the proletarii and capite cenfi, or perhaps to have their names entered in the Carites tabula.

WE have elfewhere observed, that the Roman laws did not admit of fiduciary bequests. The hopes of evading the Voconian law were the cause of their being introduced; they instituted an heir qualified by the law, and they begged he would refign the fuccession to a person whom the law had excluded: this new method of disposition was productive of very different effects. Some refigned the inheritance; and the conduct of Sextus Peduceus + on an occasion of this nature was very furprizing. A confiderable fuccession was left him, and no body living knew that he was defired to refign it to another; when he waited upon the widow of the testator, and made over to her the whole fortune belonging to her late husband.

OTHERS kept possession of the inheritance; and here the example of P. Sextilius Rufus is likewise remarkable, having been made use of by Cicero + in his disputations against the Epicureans. "In " my younger days, fays he, I was defired by Sex-" tilius to accompany him to his friends, in order " to know whether he ought to restore the inherit-"ance of Quintus Fadius Gallus to his daughter " Fadia. There were feveral young people pre-" fent, with others of more maturity and judg-

<sup>\*</sup> In Caritum tabulas referri; ararius fieri.

f Cicero, de finib. boni & mali, lib. 2.

<sup>4</sup> Ibid.

ment; and not one of them was of opinion that " he should give more to Fadia, than the lady was " intitled to by the Voconian law. In confequence " of this, Sextilius kept possession of a fine estate, " of which he would not have retained a fingle fe-" stercius, had he preferred justice to utility. It

" is possible, added he, that you would have refign-" ed the inheritance: nay, it is possible that Epi-" curus himself would have refigned it; but you

" would not have acted according to your own " principles." Here I shall stop a little to reslect.

IT is a misfortune inherent to humanity, that legislators should be sometimes obliged to enact laws repugnant to the dictates of nature: fuch was the Voconian law. The reason is, the legislature confiders the fociety rather than the citizen, and the citizen rather than the man. The law facrificed both the citizen and the man, and directed its views to the prosperity of the republic. Suppose a perfon made a fiduciary bequest in favour of his daughter; the law paid no regard to the fentiments of nature in the father, nor to the filial piety of the daughter; all it had an eye to, was the person to whom the bequest was made in trust, and who on fuch occasion found himself in a terrible dilemma. If he restored the estate, he was a bad citizen; if he kept it, he was a bad man. None but goodnatured people thought of eluding the law; and they could pitch upon none but honest men to help them to elude it; for a trust of this nature requires a triumph over avarice and inordinate pleafure, which none but honest men are like to obtain. Perhaps in this light to look upon them as bad citizens, would have favoured too much of feverity. It is not impossible but the legislator car711.

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ried his point in a great measure, since his law was of such a nature, as obliged none but honest men to elude it.

At the time when the Voconian law was passed, the Romans still preserved some remains of their ancient purity of manners. Their conscience was sometimes engaged in favour of the law; and they were made to swear they would observe it \*: so that honesty, in some measure, was set in opposition against itself. But latterly, their morals were corrupted to such a degree, that the siduciary bequests must have had less efficacy to elude the Voconian law, than that very legislator had to ensorce its observance.

The civil wars were the destruction of an immense number of citizens. Under Augustus, Rome was almost deserted: it was necessary to repeople it. They made the Papian laws, which omitted nothing that could encourage † the citizens to marry, and procreate children. One of the principal means was to increase ¶, in favour of those who gave into the views of the law, the hopes of being heirs, and to lessen the expectations of those who refused; and as the Voconian law had rendered women incapable of succeeding, the Papian law, in certain cases, dispensed with this prohibition.

WOMEN 4, particularly those who had children, were rendered capable of receiving in virtue of the will of their husbands; they even might, when they

Sextilius said he had sworn to observe it. Cic. de finibus boni & mali, lib. 2.

<sup>+</sup> See what has been faid in book 23, ch. 21.

The same difference occurs in several regulations of the Papian law. See the Fragments of Ulpian, sect. 4, 5, and 6.

Sce Fragm. of Ulpian, tit, 15. fect. 16.

had children, receive in virtue of the will of strangers. All this was in direct opposition to the regulations of the Voconian law: and yet it is surprizing that the spirit of this law was not entirely abandoned. For instance, the Papian law, which permitted a man who had one child , to receive an entire inheritance by the will of a stranger, granted the same favour to the wise only when she had three children .

It must be observed, that the Papian law did not render the women who had three children capable of succeeding, except in virtue of the will of strangers; and that with respect to the succession of relations, it lest the ancient laws, and particularly & the Voconian, in all their force. But this did not long subsist.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a stop to the luxury of women was no longer minded. Aulus Gellius, who lived under Adrian, tells us, that in his time the Voconian law was almost abolished; it was buried under the opulence of the city. Thus we find in the sentences of Paulus, who lived under Niger, and in the fragments of Ulpian, who was in the time of Alexander Severus, that the sisters on the father's side might succeed, and that none but the relations of a more dis-

A Quod tibi filialus, vel filia nascitur ex me, Jura Parentis babes; propter me scriberis beres.

Juvenal. Sat. 9.

<sup>†</sup> See Law. 9. C. Theod de bonis proseriptorum, & Dio, lib. 5. See the Fragm. of Ulpian, tit. last, sect. 6. and tit. 29. sect. 3.

<sup>§</sup> Frag. of Ulpian, tit. 16 fect. 1. Sozomenus, lib. 1. cap. 9.

<sup>4</sup> Lib. 20. cap, 1, \* Lib, 4, tit. 8 fct. 3.

<sup>#</sup> Tit. 26. fect. 6,

tant degree were in the case of those prohibited by

THE ancient laws of Rome began to be thought fevere. The prætors were no longer moved but by reasons of equity, moderation, and decorum.

We have seen, that by the ancient laws of Rome mothers had no share in the inheritance of their children. The Voconian law afforded a new reason for their exclusion. But the emperor Claudius gave the mother the succession of her children as a consolation for her loss. The Tertullian senatus consultum, made under Adrian 4, gave it them when they had three children, if free women; or four, if they were freed women. It is obvious, that this decree of the senate was only an extension of the Papian law, which in the same case had granted to women the inheritances less them by strangers. At length Justinian + savoured them with the succession independently of the number of their children.

THE same causes, which had debilitated the law against the succession of women, subverted that Ly degrees which had limited the succession of the relations on the woman's side. These laws were extremely conformable to the spirit of a good republic, where they ought to have such an insuence, as to prevent this sex from rendering either the possession, or the expectation, of wealth, an instrument of luxury. On the other hand, the luxury of a monarchy rendering markiage expensive and costly, it ought to be there encouraged, both

That is, the emperor Pius, who changed his name to that of Adrian by adoption.

<sup>+</sup> Lib. 2. Cod. de jure liberorum. Inflit, tit 3. fect. 4, de senatus. consult.

by the riches which women may bestow, and by the hope of the inheritances it is in their power to pro-Thus when monarchy was established at Rome, the whole fystem of successions was changed. The prætors called the relations of the woman's fide in default of those of the male fide: though by the ancient laws, the relations of the woman's fide were never called. The Orphitian fenatus confultum called children to the fuccession of their mother; and the emperors Valentinian a. Theodofius, and Arcadius, called the grandchildren by the daughter, to the succession of the grandfather. In a word, the emperor Justinian + left not the least vestige of the ancient right of succesfions: he established three orders of heirs, the defcendants, the afcendants, and the collaterals, without any, diffinction between the males and females; between the relations on the woman's fide, and those on the male side; and abrogated all of this kind, which were still in force: he thought, that he followed nature even in deviating from what he called the emparraffments of the ancient juriforudence.



Lib. 9. Cod. de fuis & legitimis baredibus. & Nov. 218, & 127.

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#### B. O. O. K. XXVIII.

Of the Origin and Revolutions of the civil Laws among the Frenchack act of basubes and we say d only read thele two laft and get to me

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Different Character of the Laws of the feveral Peoden range ple of Germany anthree drive the

A FTER the Franks had forfaken their own country, they made a compilement of the Salic laws, with the affishance of the fages of their own nation. The tribe of the Ripharian Franks having joined itself under Clovis + to that of the Salians, preferved its own customs; and Throdoria Tking of Australia commanded them to be reduced into writing. He also collected 6 the customs. of those Bavarians and Germans who were dependent on his kingdom. For Germany having been weakened by the migration of fuch a multitude of people, the Franks, after conquering all before them, made a retrograde march, and extended their dominion into the forests of their ancestors. Very

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See the prologue to the Salio law. Mr. Leibnitz fays, in his treatise of the origin of the Franks, that this law was made before the reign of Glovis: but it could not be before the Franks had quitted Germany, for at that time they did not understand the Latin: tengue.

<sup>+</sup> See Gregory of Tours.

See the prologue to the law of the Bavarians, and that to the Salic law.

<sup>&</sup>amp; Ibid.

likely the Thuringian code \* was given by the same. Theodoric, since the Thuringians were likewise his subjects. As the Frisians were conquered by Charles Martel and Pepin, their † law cannot be prior to those princes. Charlemain, the first that reduced the Saxons, gave them the law still extant; and we need only read these two last codes, to be convinced they came from the hands of conquerors. As soon as the Visigoths, the Burgundians, and the Lombards, had sounded their respective kingdoms, they reduced their laws into writing, not with an intent of obliging the conquered nations to conform to their customs, but with a design of following them themselves.

There is an admirable simplicity in the Salie and Ripuarian laws, as well as in those of the Alemans, Bavarians, Thuringians, and Frisians. They breathe an original coarseness, and a spirit which no change or corruption of manners had weakened. They received but very sew alterations, because all those people, except the Franks, remained in Germany. Even the Franks themselves laid there the foundation of a great part of their empire; so that they had none but German laws. The same cannot be said of the laws of the Visigoths, of the Lombards and Burgundians; their character considerably altered from the great change which happened in the character of those people, after they had settled in their new habitations.

THE kingdom of the Burgundians did not last long enough to admit of great changes in the laws of the conquering nation. Gundebald and Sigismond, who collected their customs, were almost the last

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<sup>·</sup> Lex Angliorum Werinorum, boc est Thuringorum.

<sup>†</sup> They did not know how to write.

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of their kings. The laws of the Lombards received additions rather than changes. The laws of Rotharis were followed by those of Grimvaldus. Luisprandus, Rachis and Aftulphus; but did not affume a new form. It was not fo with the laws of the Vifigoths +; their kings new-moulded them, and had them likewife new-moulded by the clergy.

THE kings indeed of the first race struck out of + the Salic and Ripuarian laws whatever was absolutely inconfiftent with Christianity; but left the main part untouched. This cannot be faid of the laws of the Vifigoths.

THE laws of the Burgundians, and particularly those of the Viligoths, admitted of corporal punishments: these were not tolerated & by the Salic and' Ripuarian laws; they preserved their character much Better.

THE Burgundians and Viligoths, whose provinces were greatly exposed, endeavoured to conciliate the affections of the ancient inhabitants, and to give them the most impartial civil laws "; but as' the kings of the Franks had established their power, they had no fuch ¶ confiderations.

THE Saxons, who lived under the dominion of

<sup>◆</sup> They were made by Euric, and amended by Leovigildus, See-Indorus's chronicle, Chaindafinthus and Reseffuinthus reformed them. Egigas ordered the code now extant to be mide, and commissioned bishops for that purpose; nevertheless, the laws of Chaindaswinthus: and Recession has were preserved, as appears by the fixth council of Toledo.

<sup>†</sup> See the prologue to the law of the Bavarians,

We find a few only in Childebert's decree.

<sup>\*</sup> See the prologue to the code of the Burgundians, and the code itself, effecially the rath tit. fect. 5. and tit. 38. See also Gregory of Tours, book a. chap. 33. and the code of the Viligoths.

See lower down, chap. 3.

the Franks, were of an intractable temper, and prone to revolt. Hence we find in their \* laws the feverities of a conqueror, which are not to be met with in the other codes of the laws of the Barbarians.

WE see the spirit of the German laws in the pecuniary panishments, and the spirit of a conqueror in those of an afflictive nature.

THE crimes they commit in their own country are subject to corporal punishment; and the spirit of the German laws is followed only in the punishment of crimes committed beyond the extent of their own terrirory.

THEY are plainly told, that their crimes shall meet with no mercy, and they are refused even the asylum of churches.

THE bishops had great authority at the court of the Visigoth kings; the most important affairs being debated in councils. All the maxims, principles, and views of the present inquisition, are owing to the code of the Visigoths; and the monks have only copied against the Jews, the laws formerly enacted by bishops.

In other respects the laws of Gundehald for the Burgundians seem pretty judicious; and those of Rotharis, and of the other Lombard princes, are still more so. But the laws of the Visigoths, those, for example of Recessianthus, Chaindaswinthus, and Egigas, are puerile, ridiculous, and sodish; they attain not their end; they are stuft with rhetoric, and void of sense; frivolous in the substance, and bombastic in the stile.

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<sup>4</sup> See chap. a. feet, 8 and g, and chap. 4. feet, 2 and 7

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#### edit of particular and whiteholders and train CHAP. II.

That the Laws of the Barbarians were all personal.

TT is a diffinguishing character of these laws of the barbarians, that they were not confined to certain district; the Frank was tried by the law: of the Franks, the Aleman by that of the Alemans, the Burgundian by that of the Burgundians, and the Roman by the Roman law: nay, fo far were the conquerors in those days from reducing: their laws to an uniform system or body, that they: did not even think of becoming legislators to the

people they had fubdued.

THE original of this I find in the manners of the These people were parted asunder by marshes, lakes and forests; and Crefar + observes, they were fond of fuch separations. Their dread of the Romans brought about their re-union; and yet each individual among these mixt people was: still to be tried by the established customs of his: own nation. Each tribe apart was free and independent; and when they came to be intermixt, the independency still continued; the country was common, the government peculiar; the territory the same, and the nations different: The spirit of perfonal laws prevailed therefore among those people before ever they fet out from their own homes, and they carried it with them into the conquered provinces.

WE find this cultom established among the formula's of Marculfus-t, in the codes of the laws of

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<sup>◆</sup> De bello Gallice, lib. 6. + Lib. 1. formul, 9.

the barbarians, but particularly in the law of the Ripuarians §, and in the decrees of the kings of the first race \*, from whence the capitularies on that subject in the second ¶ race were derived. The children \* followed the law of the father, the wise † that of the husband, the widow † came back to her own original law, and the freedman § was under that of his patron. Besides, every man could make choice of what laws he pleased; but the constitution of ¶ Lotharius I. required this choice should be made public.

### СНАР. ПІ.

Capital Difference between the Salic Laws, and those of the Visigoths and Burgundians.

Burgundians and Visigoths were impartial; but it was otherwise with respect to the Salic law, for it established between the Franks and Romans the most mortifying distinctions. When a Frank, a Barbarian, or one living under the Salic law, happened to be killed, a composition of 200 sols was to be paid to his relations \*; only 100 upon the

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<sup>5</sup> Chap. 31.

That of Clotarius in the year 500; in the edition of the Capitularies of Balufus, vol. 2. art. 4. ib. in fine.

<sup>9</sup> Capitul. added to the law of the Lombards, lib. 2, tit, 25. caps 72. lib. 2. tit, 42. cap. 7. and tit. 50. cap. 7 and 2.

<sup>-</sup> Ibid.

<sup>♦</sup> Ibid, lib. 6, tit. 7. cap. 1.

<sup>7</sup> Ibid cip. 4. solor wife in the library to a figure

<sup>§</sup> Ibid. lib. 2. tit. 35 cap. 2.

In the law of the Lombards, lib, a, tit. 57.

<sup>4</sup> Salie law, tit 44 feft. 1.

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killing of a Roman proprietor +, and no more than 45 for a Roman tributary. The composition for the murder of one of the king's vassals, if a Frank 6. was 600 fols; if a Roman, though the king's guest \*, only 300 %. The Salic law made therefore a cruel distinction between the Frank and Roman lord, and the Frank and Roman commoner.

FARTHER, if a number of people were got together to affault a Frank in his house . and he happened to be killed, the Salic law ordained a composition of 600 fols; but if a Roman or a freedman + was affaulted, only half that composition. By the same law 6, if a Roman put a Frank in irons, he was liable to a composition of 30 fols; but if a Frank had thus used a Roman, he paid only 15. A Frank, stript by a Roman, was intitled to the composition of 622 fols, and a Roman: ftript by a Frank, received only: 30. Such unequal treatment must needs have been very grievous: to a Roman.

AND yet a famous author \* forms a system of the. establishment of the Franks in Gaul, on a supposition that they were the best friends of the Romans. The Franks then the best friends of the Romans,

<sup>+</sup> Qui res in pago ubi remanet proprias babet. Salic law, til. 44. fect. 15.

S Qui in trufte dominica eft. Ibid. tit. 41, fect. 4.

<sup>.</sup> Si Romanus homo conviva regis fuerit. Ibid. fect. 6:

The principal Romans followed the court, as may be feen by the lives of several bishops, who were there educated; there were hardly any but Romans that knew how to write, 18 20 1100 8 16

<sup>+</sup> Salic lew, tit. 45.

<sup>+</sup> Lidus, whose condition was better than that of a bondman. Laws of the Alemans, chap. 95.

<sup>5</sup> Tit. 35. feet, 3 and 4v

The Abbe du Bos.

they who did, and they who suffered § from, the Romans such an infinite deal of mischies! The Franks, the friends of the Romans, they who, after subduing them by their arms, oppressed them in cold blood by their laws! They were exactly the friends of the Romans, as the Tartars who subdued China, where the friends of the Chinese.

Is fome Catholic bishops thought fit to make use of the Franks in destroying the Arian kings, does it follow, that they had a desire of living under those barbarous people? And can we from hence conclude, that the Franks had any particular regard for the Romans? I should draw quite different consequences; the less the Franks had to sear from the Romans, the less indulgence they shewed them.

THE Abbe du Bos has consulted but indifferent authorities for his history, such as poets and orators: works of parade and ostentation are improper foundations for building systems.

#### CHAP. IV.

In what manner the Roman Law came to be lost in the Country subject to the Franks, and preserved in that subject to the Goths and Burgundians.

HAT has been faid above, will throw fome light upon other things, which have hitherto been involved in great obscurity.

THE country at present called France, was, under the first race, governed by the Roman law, or

<sup>§</sup> Witness the expedition of Arbogastes in Gregory of Tours, Hist, lib. 2.

the Theodolian code, and by the different laws of the Barbarians , who lettled in those parts.

In the country subject to the Franks, the Salic law was established for the Franks, and the Theodosian code for the Romans. In that subject to the Visigoths, a compilement of the Theodosian code, made by order of Alaric \*, regulated disputes among the Romans; and the national customs which Euric \* caused to be reduced into writing, determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks, and the Roman law gradually decayed; whilst in the jurisdiction of the Visigoths the Roman law spread itself, and obtained, at last, a general sway?

My answer is, that the Roman law came to be disused among the Franks, because of the great advantages accruing from being a Frank, a Barbarian †, or a person living under the Salie law; every one, in that case, readily quitted the Roman, to live under the Salie law. The § clergy alone retained it, as a change would be of no advantage to them. The difference of conditions and ranks, consisted only in the largeness of the composition.

<sup>+</sup> The Franks, Viligoths, and Burgundians.

<sup>+</sup> It was finished in 438.

The noth year of the reign of this prince, and published two years after by Anian, as appears from the preface to that code.

The year 504 of the Spanish era, the chronicle of Ridorus.

<sup>+</sup> Francum, aut Barbarum, aut hominum qui Salica lege vivit. Selic law, tit. 44. fect. v.

<sup>§</sup> According to the Roman law under which the church lives, as is faid in the law of the Ripuarians, tit. 58. feet. 1. See likewife the numberless authorities on this head produced by Du Cange, under the word Lex Romana.

as I shall shew in another place. Now \* particular laws allowed the clergy as favourable compositions as those of the Franks; for which reason they retained the Roman law. This law brought no hardships upon them; and in other respects it was properest for them, as it was the work of Christian emperors.

On the other hand, in the patrimony of the Virigoths, as the Vifigoth law regave no civil advantages to the Vifigoths over the Romans, the latter had no reason to discontinue living under their own law, in order to embrace another. They retained therefore their own laws, without adopting those of the Visigoths.

This is still farther confirmed, in proportion as we proceed in our enquiry. The law of Gundes bald was very impartial, not favouring the Burgundians more than the Romans. It appears by the preamble to that law, that it was made for the Burgundians, and to regulate the disputes which might arise between them and the Romans; and in the latter case, the judges were equally divided of a side. This, was necessary for particular reasons drawn from the political regulation of those times. The Roman law was continued in Burguady, in order

See the Capitularies added to the Salie law in Lindembrock, at the end of that law, and the different codes of the laws of the Barbarians, concerning the privileges of eccleliaftics in this respect. See likewise the letter of Charlemain to his son Pepin king of Italy, in the year 807, in the edition of Baluzius, tom. 1. pag. 46a. where it is said, that an ecclesiastic should receive a triple composition; and the Collection of the Capitularies, lib. 5. art. 302, tom. 1. Edition of B. luzius.

<sup>-</sup> See that law,

<sup>4</sup> Of this I shall speak in another place, book-30 chap, 6, 7, & and 9,

to regulate the disputes of the Romans among themselves. The latter had no inducement to quit their own law, as in the country of the Franks; and the rather, as the Salic law was not established in Burgundy, as appears by the celebrated letter which Agobard wrote to Lewis the Pious:

AGOBARD + defired that prince to establish the Salic law in Burgundy; consequently it had not been established there at that time. Thus the Roman law did, and still does subsist in so many provinces, which formerly depended on this kingdom.

THE Roman and Gothic laws continued also in the country of the establishment of the Goths; where the Salic law was never received. When Pepin and Charles Martel expelled the Saracens, the towns and provinces, which submitted to these princes 4, petitioned for the continuance of their own laws, and obtained it: this, notwithstanding the usages of those times, when all laws were perfonal, soon made the Roman law to be considered as a real and territorial law in those countries.

This appears by the edict of Charles the Bald, given at Pistes in the year 864, which + distinguishes the countries where causes were decided by the Roman law, from where it was otherwise.

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<sup>\*</sup> See Gervais de Tilbury, in Duchessee's collection tom 3. page 366. Fasta pastione cum Francis, quod illic Gothi patriis legibus, moribus paternis vivant. Et sic Narbonensis provincia Pippino subjicitur. And a chronicle of the year 759. produced by Catel, hist, of Languedoc. And the uncertain author of the life of Lewis the Pious, upon the demand made by the people of Septimania, at the assembly in Canissaco, in Duchessee's collection, tom. 2. page 316.

<sup>+</sup> In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; & illa terra in qua, &0, Ast. 16. See also Art. 20.

The edict of Pistes shows two things; one, shot there were countries where causes were decided by the Roman law, and others where they were not; and the other, that those countries where the Roman law obtained, were exactly, \* the same where it is still sollowed at this very day, as appears by the same edict: thus the distinction of the provinces of France under custom, and those under written law, was established at the time of the ended of Pistes.

I HAVE observed, that in the beginning of the monarchy, all laws were personal: and thus when the edict of Pistes distinguishes the countries of the Roman law from those which were otherwise; the meaning is, that in countries which were not of the Roman law, such a multitude of people had chosen to live under some or other of the laws of the Barbarians, that there were hardly any who would be subject to the Roman law; and that in the countries of the Roman law there were sew who would choose to live under the laws of the Barbarians.

will be reckoned new; but if the things which I affect be true, certainly they are very ancient. After all, what great matter is it, whether they come from me, from the Valefus's, or from the Bignons?

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See Art. 12 and 16, of the edict of Pistes in Cavilona, in Nurbona, &cc.

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Continuation of the same Subject.

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THE law of Gundebald fublifted a long time among the Burgundians, in conjunction with the Roman law: it was fill in use under Lewis the Pious, as Agobard's letter plainly evinces. In like manner, though the edict of Piftes calls. the country occupied by the Viligoths the country of the Roman law, yet the law of the Vifigoths was always in force there; as appears by the fynod of Troyes, held under Lewis the Stammerer, in the year 878, that is, fourteen years after the edict of Piffes had mon all to anotheritar sale same all

In process of time the Gothic and Burgundian laws fell into difuse even in their own country's which was owing to those general causes that exery where suppressed the personal have of the Barfurnish our durites for that science that were smant ed into regulation. Now which could better formish

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How the Roman Law kept its Ground in the Des mesne of the Lombards.

HE facts all coincide with my principles. The law of the Lombards was impartial, and the Romans were under no temptation to forfake. their own for it. The motive which prevailed with the Romans under the Franks to make choice of the Salic law, did not take place in Italy; hence the Roman law maintained itself there, together with that of the Lombards and af agint of organish to

It even fell out, that the latter gave way to the Roman institutes, and ceased to be the law of the ruling nation; and though it continued to be that of the principal nobility, yet the greatest part of the cities formed themselves into republics, and the nobility mouldered away of themselves, or were destroyed. The citizens of the new republics had no inclination to adopt a law, which established the custom of judiciary combats, and whose institutions retained much of the customs and usages of chivalry. As the clergy of those days, a clergy even then so powerful in Italy, lived almost all under the Roman law, the number of those, who solutioned the institutions of the Lombards, must have, daily decreased.

Besides, the inflitutions of the Lombards had not that extent, that majesty of the Roman law, by which Italy was reminded of her universal dominion. The institutions of the Lombards and the Roman law could be then of no other use than to furnish out statutes for those cities that were erected into republics. Now which could better furnish them, the institutions of the Lombards that determined on some particular cases, or the Roman law which embraced them all?

## CHAP. VII.

How the Roman Law came to be loft in Spain.

THINGS happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chaindasuinthus \* and Recessu-

See what Machiavel fays of the ruin of the ancient nobility of

<sup>\*</sup> Hebegan to reign in the year 64 at 101 In 1 in said days

inthus † profcribed the Roman laws, and even forbad citing them in their courts of judicature. Recessuinthus was also author \* of the law which took off the prohibition of marriages between the Goths and Romans. It is obvious that these two laws had the same spirit: this king wanted to remove the principal causes of separation, which subsisted between the Goths and the Romans. Now it was thought, that nothing made a wider separation than the prohibition of intermarriages, and the liberty of living under different institutions.

Bur though the kings of the Vifigoths had proferibed the Roman law, it still sublisted in the demesnes they possessed in South Gaul. These countries being distant from the center of the monarchy, lived in a flate of great independence. fee from the history of Vamba, who ascended the throne in 672, that the natives of the country were become the prevailing party 6. Hence the Roman law had greater authority, and the Gothic lefs. The Spanish laws neither suited their manners, nor their actual fituation; the people might likewise be obstinately attached to the Roman law. because they had annexed to it the idea of liberty. Besides, the laws of Chaindasuinthus, and of Recessuinthus, contained most severe regulations against the Jews; but these Jews had a great deal

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Ut tam Gotho-Romanam, quam Romano-Gotham matrimonio liceat. Socieri, Law of the Viligoths, lib. 3. tit. 1. cap. 1.

<sup>†</sup> We will no longer be haraffed either by foreign or by the Roman laws. Law of the Visigoths, lib. 2. tit. 1. feet, 9 and 10.

by the fentence in the fequel of the history. Paulus and his adherents were Romans: they were even favoured by the bishops. Vamba durst not put to death the rebels whom he had quelled Thosauthor of the history calls Narbonne Gaul the nursery of treason.

of power in South Gaul. The author of the history of king Vamba calls these provinces the brothel of the Jews. When the Saracens invaded these provinces, it was by invitation; and who could have invited them but the Jews or the Romans? The Goths were the first that were oppressed, because they were the ruling nation. We see in Proceeding their calamities they withdrew out of Narbonne Gaul into Spain. Under this missortune, without doubt, they took resuge in those provinces of Spain, which still held out; and the number of those, who in South Gaul lived under the law of the Visigoths, was thereby greatly lessened.

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## A false Capitulary.

Levita attempt to transform this Vifigoth establishment, which prohibited the use of the Roman law, into a capitulary \*, ascribed since to Charlemain? He made of this particular institution a general one, as if he intended to exterminate the Roman law throughout the world.

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<sup>+</sup> Gothi, qui cladi superfuerant, ex Gallia cum uxoridus liberisque egressi, in Hispanism ad Teudim jam palam syranuum se receperunt. De Bello Gothorum, lib. 1. cap. 13.

<sup>\*</sup> Capitularies, lib. 6, cap. 269; of the year 1613. edition of Ba-

#### CHAP. IX.

In what manner the Codes of the Barbarian Laws, and the Capitularies came to be loft.

HE Salic, the Ripuarian, Burgundian, and Visigoth laws, came by degrees to be disused among the French in the following manner:

As fiefs were become hereditary, and arrierefiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit indeed was continued, which was to regulate most disputes by fines. But as the value of money was, undoubtedly, subject to change, the fines were also changed; and we see several charters +, where the lords fixed the fines, that were payable in their petty courts. Thus the spirit of the law was followed, without adhering to the law itself.

Besides, as France was divided into a number of petty lordships, which acknowledged rather a feudal than a political dependence, it was very difficult for only one law to be authorised. And indeed, it would be impossible to see it observed. The custom no longer prevailed of sending extraordinary \* officers into the provinces, to inspect into the administration of justice, and political affairs; it appears, even by the charters, that when new siefs were established, our kings divested themselves of the right of sending those officers. Thus, when almost every thing was become a sief, these officers could not be employed; there was no longer a com-

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<sup>†</sup> M. de la Thaumassiere has collected many of them. See, for instance, chap. 6r. 66, and others.

<sup>\*</sup> Miffi Domini.

mon law, because no one could enforce the obser-

THE Salic, Burgundian, and Visigoth laws, were therefore very much neglected at the end of the second race; and at the beginning of the third, they were scarce ever mentioned.

UNDER the first and second race, the nation was frequently affembled; that is, the lords and bishops; the commons were not yet thought on. In these affemblies, attempts were made to regulate the clergy, a body which formed itself, if I may so speak, under the conquerors, and established its privileges. The laws made in these affemblies, are what we call the capitularies. Hence four things enfued; the feudal laws were established, and a great part of the church revenues was administered by those taws; the clergy effected a wider separation, and neglected + those decrees of reformation, where they themselves were not the only reformers; a collection \* was made of the canons of councils and of the decretals of popes; and thefe the clergy received, as coming from a purer fource. Ever fince the erection of the grand fiefs, our kings, as has

+ Let not the bishops, f ys Charles the Bald, in the capital ry of 844, art. 8. under pretence of the authority of making canons, oppose this constitution, or neglect the observance of it. It seems he already foresaw the fall thereof.

In the collection of canons, a vast number of the decretals of popes were inserted; there were very sew in the ancient collection. Dionysius Exiguus put a great many into his: but that of Isidorus Mercator was stuffed with genuine and spurious decretals. The old collection obtained in France till Charlemain. This prince received from the hands of Tope Adrian I. the collection of Dionysius Exiguus, and caused it to be accepted. The collection of Isidorus Mercator appeared in France about the reign of Charlemain: people grew passionately find of it: to this succeeded what we now call the course of canon law.

been already observed, had no longer any deputies in the provinces to enforce the observance of their laws; and hence it is, that under the third race, we find no more mention made of capitularies. an lanes, as specimes Quite Romen Lane, and my

### CHAP. Xinh

Continuation of the fame Subject.

EVERAL capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of enquiry: but it must be fought for in the thing itself: There was several kinds of capitularies. Some had relation to political government, others to occonomical, most of them to ecclesastical polity, and some few to civil government. Those of the last species were added to the civil law, that is, to the personal laws of each nation; for which reason it is said in the capitularies, that there is nothing stipulated therein contrary to the Roman law. In effect, those capitularies regarding œconomical, ecclefiaftical, or political government, had no relation to that law; and those concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged, or abridged. But the adding of these capitularies to the personal laws, occasioned, I suppose, the neglect of the very body of the capitularies themselves: in times of ignorance, the abridgment of a work often causes the loss of the work itself.

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### CHAP. XI.

Other Causes of the Disuse of the Codes of Barbarian Laws, as well as of the Roman Law, and of the Capitularies.

HEN the German nations conquered the Roman empire, they learnt the use of writing; and, in imitation of the Romans, they wrote down their own ulages +, and digefted them into codes. The unhappy reigns which followed that of Charlemain, the invalions of the Normans. and the civil wars, plunged the victorious nations again into the darkness out of which they had emerged: fo that reading and writing were quite neglected. Hence it is, that in France and Germany, the written laws of the Barbarians, as well as the Roman law, and the capitularies, fell into oblivion. The use of writing was better preserved in Italy, where reigned the popes and the Greek emperors, and where there were flourilling cities. which enjoyed almost the only commerce in those days. It was owing to this neighbourhood of Italy, that the Roman law was better preferved in the provinces of Gaul, formerly subject to the Goths and Burgundians; and fo much the more, as this law was there a territorial institution, and a kind of privilege. It is probable, that the difuse of the Viligoth laws in Spain proceeded from the want of

<sup>4</sup> This is expresty set down in some preambles to these codes: we even find in the laws of the Saxons and Frisians different regulations, according to the different districts. To these usages were added some particular regulations, suitable to the exigency of circumstances; such were the severe laws against the Saxons.

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writing; and by the loss of so many laws, customs

were every where established.

PERSONAL laws fell to the ground. Compofitions, and what they call Freda , were regulated more by custom than by the text of these laws. Thus, as in the establishment of the monarchy, they had passed from German customs to written laws; fome ages after, they came back from written laws to unwritten customs.

### C H A P. XII.

Of local Customs. Revolution of the Laws of barbarous Nations, as well as of the Roman Law.

T appears by feveral monuments, that there were local customs, so early as the first and se-We find mention made of the custom of the place, of the ancient usage +, of the custom , of the laws ¶, and of the customs. Some authors have thought, that what went by the name of customs were the laws of the barbarous nations. and what had the appellation of law were the Roman institutes. This cannot possibly be. King Pepin - ordained, that wherever there should happen to be no law, custom should be complied with; but that it should never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the Barbarians, is fubverting all monuments of antiquity, and parti-

<sup>♦</sup> I shall speak of this elsewhere.

<sup>-</sup> Preface to Marculfur's Formula.

<sup>†</sup> Law of the Lombards, book 2. tit. 58, feet. 3.

Law of the Lombards, book 2. tit. 41. fect. 6.

<sup>1</sup> Life of St. Leger.

<sup>-</sup>o- Law of the Lombards, book 2. tit. 41, feet, 6,

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cularly those codes of Barbarian laws, which con-

So far were the laws of the barbarous nations from being those customs, that it was these very laws, as personal inflitutes, which introduced them. The Salic law, for example, was a personal law; but generally, or almost generally, in places inhabited by the Salian Franks, this Salic law, how personal soever, became, in respect to those Salian Franks, a territorial institution, and was personal only with respect to those Franks who lived elsewhere. Now, if feveral Burgundians, Alemans, or even Romans, should happen to have frequent disputes, in a place where the Salic law was territorial, they must have been determined by the laws of those people; and a great number of decisions agreeable to some of those laws must have introduced new customs into the country. This explains the constitution of Pepin. It was natural that those customs should affect even the Franks, who lived on the fpot, in cases not decided by the Salic law; but it is not natural that they should prevail over the Salic law itself.

Thus there were in each place an established law, and received customs which served as a supplement to that law when they did not contradict it.

THEY might even happen to fupply a law that was no way territorial: and to continue the same example, if a Burgundian was judged by the law of his own nation, in a place where the Salie law was territorial, and the case happened not to be explicitly mentioned in the very text of this law, there is not the least doubt but judgment would

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have been passed upon him according to the custom of the place.

In the reign of king Pepin, the customs then established had not the same force as the laws; but it was not long before the laws gave way to the customs. And as new regulations are commonly remedies that imply a present evil, it may well be imagined, that fo early as Pepin's time, they began to prefer the customs to the established laws.

WHAT has been faid, fufficiently explains the manner in which the Roman law began so very early to become territorial, as may be feen in the edict of Piftes; and how the Gothic law continued still in force, as appears by the fynod of Troves \* above-mentioned. The Roman was become the general personal law, and the Gothic the particular personal law; of course the Roman law was territorial. But how came it, some will ask, that the personal laws of the Barbarians fell every where into difuse, while the Roman law was continued as a territorial institution in the Visigoth and Burgundian provinces? I answer, that even the Roman law had very near the fame fate as the other personal institutions: otherwise we should still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the institutes of Justinian. Those provinces retained hardly any thing more than the name of the country under the Roman or written law; than the natural affection which people have for their own institutions, especially when they consider them as privileges; and a few regulations of the Roman law which were not yet forgotten. This was howe-

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<sup>4</sup> See chap. 5.

ver sussicient to produce such an effect, that when Justinian's compilement appeared, it was received in the provinces of the Gothic and Burgundian demesse as a written law, whereas it was admitted only as written reason in the ancient demesse of the Franks.

## CHAP. XIII.

Difference between the Salic Law or that of the Salian Franks, and that of the Ripuarian Franks, and other barbarous Nations.

THE Salic law did not allow of the custom of negative proofs; that is, if a person brought a demand or charge against another, he was obliged by the Salic law to prove it, and it was not sufficient for the accused to deny it; which is agreeable to the laws of almost every nation.

THE Taw of the Ripuarian Franks had quite a different spirit ; it was contented with negative proofs, and the person against whom a demand or accusation was brought, might clear himself, in most cases, by swearing, in conjunction with a certain number of witnesses, that he had not committed the crime laid to his charge. The number † of witnesses who were obliged to swear augmented in proportion to the importance of the affair; sometimes it amounted to § seventy-two. The laws of the Alemans, Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians,

This relates to what Tacitus fays, that the Germans had general and particular customs.

<sup>+</sup> Law of the Ripuarians, tit. 6, 7, 8, and others.

<sup>§</sup> Ibid, tit. 11, 12, and 17.

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I OBSERVED, that the Salic law did not allow of negative proofs. There was \* one case, however, in which they were allowed; but even then they were not admitted alone, and without the concurrence of politive proofs. The plaintiff 9 caused witnesses to be heard, in order to ground his accusation; the defendant likewise produced witnesses of his side; and the judge was to come at the truth, by comparing those testimonies |. This practice was vastly different from that of the Ripuarian, and other barbarous laws, where it was customary for the party accused to clear himself, by fwearing he was not guilty, and by making his relations likewise swear that he had told the truth. These laws could be suitable only to a people remarkable for their natural simplicity and candour; we shall see presently that the legislators were obliged to take proper methods to prevent their being abused,

### CHAP. XIV.

### Another Difference.

THE Salic law did not admit of the trial by combat; though it had been received by the

It was when an accusation was brought against an Antrustio, that is, the king's vassal, who was supposed to be possessed of a greater degree of liberty. See tit. 76. of the Passus legis Salica.

I See the 76th tit. of the Pattus legis Salica.

According to the practice at prefent followed in England.

laws of the Ripuarians ., and of almost all the barbarous nations. To me it feems, that the law of combat was a natural consequence, and a remedy of the law which established negative proofs. When an action was brought, and it appeared that the defendant was going to elude it by an oath, what other remedy was left to a military man , who faw himself upon the point of being confounded, than to demand fatisfaction for the injury done to him; and even for the attempt of perjury? The Salic law. which did not allow the custom of negative proofs, neither admitted nor had any need of the trial by combat: but the laws of the Ripuarians and of the other barbarous nations to who had adopted the practice of negative proofs, were obliged to effablish the trial by combat.

WHOEVER will take the trouble to examine the two famous regulations of Gundebald king of Burgundy concerning this subject, will find they are derived from the very nature of the thing. It was necessary, according to the language of the

<sup>4</sup> Tit. 32. tit. 57. felt, 2. tit. 59. felt, 4.

<sup>1</sup> See the following note.

This spirit appears in the law of the Ripuarians, tit. 59. sect. 4. and tit. 67. sect. 5. and in the Capitulary of Lewis the Pions, added to the law of the Ripuarians in the year 803, art. 22.

<sup>§</sup> See that law.

<sup>+</sup> The law of the Frifians, Lombards, Bavarians, Saxons, Thurin-

gians, and Burgundians.

In the law of the Burgundians, tit. B. fect. 1 and 2, on criminal affairs; and tit. 45, which extends also to civil affairs. See likewise the law of the Thuringians, tit. 2, fect. 31, tit. 7, fect. 6, and tir. 8, and the law of the Alemans, tit. 89; the law of the Bavarians, tit. 8, chap. 2, fect. 6, and chap. 2, fect. 1, and tit. 9, thap. 4 fect. 4, the law of the Frisians, tit. 11, fect. 3, and tit. 14, fect. 4, the law of the Lombards, book 1, tit, 32, fect. 3, and tit. 35, fect. 1, and book 2, tit, 35, fect. 2,

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Barbarian laws, to refcue the oath out of the hands

of a person who was going to abuse it.

AMONG the Lumbards, the law of Rotharis admitted of cases, in which a man who had made his defence by oath, should not be allowed to undergo the fatigue of a duel. This custom spread itself farther; we shall presently see the mischiefs that arose from it, and how they were obliged to return. to the ancient practice.

# CHAP. XV.

Indianant rate all Reflection. Those day iv tot hav engle be thisfied with the oath of a

T Do not pretend to deny, but that in the changes made in the code of the Barbarian laws, in. the regulations added to that code, and in the body of the capitularies, it is possible to find some pasfages where the trial by combatis not a confequence of the negative proof. Particular circumstances might, in the course of many ages, give rise to particular laws. I speak only of the general spirit of the laws of the Germans, of their nature and origin; I fpeak of the ancient customs of those people, that were either hinted at or established by those laws; and this is the only matter in question.

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See chap, 18 towards the end. other and terminate saider diffrages, and make and to

#### Barbarden fourstation C H A P. XVI.

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Of the Ordeal or Trial by boiling Water, established by the Salic Law.

HE Salic law \* allowed of the ordeal or trial by boiling water; and as this trial was valtly cruel, the law + found an expedient to foften its rigour. It fuffered the person who had been summoned to make the trial with boiling water, to ranfom his hand, with the confent of the adverse party. The accuser, for a particular sum determined by the law, might be fatisfied with the oath of a few witnesses, declaring that the accused had not committed the crime. This was a particular case, in which the Salic law admitted of the negative proof.

This trial was a thing privately agreed upon, which the law permitted only, but did not ordain. The law gave a particular indemnity to the accufer, who would allow the accused to make his defence by a negative proof: the plaintiff was at liberty to be fatisfied with the oath of the defendant as he was at liberty to forgive him the injury.

THE law , contrived a medium, that before fentence passed, both parties, the one through fear of a terrible trial, the other for the fake of a small indemnity, should terminate their disputes, and put anendto their animolities. It is plain, that when once this negative proof was over, nothing more was requifite; and, therefore, that the practice of legal duels could not be a confequence of this particular regulation of the Salic law.

<sup>.</sup> Asalfo fome other laws of the Barbariane,

<sup>4</sup> Tit, 56.

I Ibid. tit. 56.

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### CHAP. XVII.

#### livis anote con blanchet with will another a Particular Notions of our Ancestors.

TT is amazing that our ancestors should rest the honour, fortune, and life of the subject, on things that depended less on reason than on hazard; and that they should constantly make use of proofs incapable of convicting, and that had no manner of connexion either with innocence or guilt.

THE Germans who had never been conquered \*, enjoyed an excessive independence. Different families waged war + with each other, to obtain fatisfaction for murders, robberies, or affronts. This custom was moderated, by subjecting these hostilities to rules; it was ordained, that they should be no longer committed but by the direction and under the eye of the magistrate. This was far preferable to a general licence of annoying each other.

As the Turks in their civil wars look upon the first victory as a decision of heaven in favour of the victor; fo theinhabitants of Germany, in their private quarrels, confidered the event of a combat as a decree of Providence, ever attentive to punish the criminal or the usurper.

WE are informed by Tacitus, that when one German nation intended to declare waragainst another, they looked out for a prisoner who was to fight with one of their people, and by the event they

This appears by what Tacitus fays, Omnibus idem babitus.

<sup>+</sup> Velleius Paterculus, lib. 2. cap. 18. fays, that the Germans docided all their disputes by the sword.

<sup>§</sup> See the codes of Barbarian laws, and in respect to less ancien times, Beaumanoin on the custom of Beauvoisis.

judged of the fuccess of the war. A nation who believed that public quarrels could be determined by a single combat, might very well think that it was likewise proper for deciding the disputes of individuals.

GUNDEBALD\*, king of Burgundy, gave the greatest fanction to the custom of legal duels. The reason he assigns for this sanguinary law, is mentioned in his edict. "It is, says he, in order to pre"vent our subjects from attesting by oath, what "they are not certain of, nay, what they know to be false." Thus, while the clergy declared that an impious law which permitted combats; the Burgundian kings looked upon that as a sacrilegious law, which authorized the taking of an oath.

THE trial by combat had fome reason for it founded on experience. In a military nation, cowardice supposes other vices; it is an argument of a person's having deviated from the principles of his education, of his being infenfible of honour, and of having refused to be directed by those maxims which govern other men; it shews, that heneither fears their contempt, nor fets any value upon their esteem. Men of any tolerable extraction seldom want either the dexterity requifite to co-operate with strength, or the strength necessary to concur with courage; for as they fet a value upon honour, they are practifed in matters, without which this honour cannot be obtained. Besides, in a military nation, where strength, courage, and prowessare esteemed, crimes really despicable are those which arise from fraud, artifice, and cunning, that is, from cowardice.

<sup>♦</sup> Law of the Burgundians, chap. 45.

I See the Works of Agobard.

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WITH respect to the trial by fire, after the party accused had put his hand on a hot iron, or in boiling water, they wrapped the hand in a bag, and fealed it up; if after three days there appeared nomark, he was acquitted. Is it not obvious, that amongst a people inured to the handling of arms, the impression made on a rough or callous skin by the hot iron, or by boiling water, could not be for great, as to be feen three days afterwards? And if there appeared any mark, it shewed that the perfon who had undergone the trial was an effeminate fellow. Our peafants are not afraid to handle hot: iron with their callous hands; and, with respect to the women, the hands of those who worked hard,. might be very well able to refift hot iron. The ladies \* did not want champions to defend their cause; and in a nation where there was no luxury, there: was no middle flate. handle was no middle flate.

By the law of the Thuringians, a woman accused of adultery was condemned to the trial by boiling water, only when there was no champions to defend her; and the law of the Ripuarians admits of this trial, only when a person had no witnesses to appear in his justification. Now a woman, that could not prevail upon any one relation to defend her cause, or a man that could not produce one single witness to attest his honesty, were, from those very circumstances, sufficiently convicted.

I CONCLUDE therefore, that under the circum-

<sup>\*</sup> See Beaumanoir on the custom of Beauvoisis, chap. 61. See also the law of the Angli, chap. 14. where the trial by boiling water is onally a subsidiary proof.

<sup>. 4</sup> Tit. 14.

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the trial by hot iron and boiling water obtained, there was such an agreement between those laws and the manners of the people, that the laws were rather unjust in themselves than productive of injustice, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

### C H A P. XVIII.

In what manner the Custom of judicial Combats gained Ground.

FROM Agobard's letter to Lewis the Pious, it might be inferred, that the custom of judicial combats was not established among the Franks; for after having represented to that prince the abuses of the law of Gundebald, he desires \* that private disputes should be decided in Burgundy by the law of the Franks. But as it is well known from other quarters, that the trial by combat prevailed at that time in France, this has been the occasion of some perplexity. However, the difficulty may be solved by what I have said; the law of the Salian Franks did not permit this kind of trial, and that of the Ripuarian Franks did.

Bur, in spite of the clamours of the clergy, the custom of judicial combats gained ground continually in France; and I shall presently make it appear, that the clergy themselves were in a great measure the occasion of it.

Ir is the law of the Lombards that furnishes us

Si placeret l'omino nostro ut eos transferret ad legem Francorum.

<sup>+</sup> See this law, tit. 59. feet. 4. and tit. 67. fect. 5.

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with this proof. "There has been long fince an " abominable custom introduced, (fays the pream-" ble to the constitution of Otho II.) this is, that " if the title to an estate was faid to be false, the " person who claimed under that title made oath " upon the gospels that it was genuine; and with-" out any farther judgment he took possession of " the estate: fo that they who would perjure them-" felves, were fure of gaining their point." The emperor Otho I. having caufed himfelf to be crowned at Rome 1 at the very time that a council was held there under pope John XII. all the lords \* of Italy represented to that prince the necessity of enacting a law to reform this horrid abuse. The pope and the emperor were of opinion, that the affair should be referred to the council, which wasto be shortly held + at Ravenna. There the lords made the same representations, and repeated their instances; but the affair was put off once more, under pretence of the absence of particular persons. When Otho II. and Conrad ¶ king of Burgundy arrived in Italy, they had a conference at Verona with the Italian lords 6; and at their repeated remonstrances, the emperor, with their unanimous

1 The year 96a.

tedati menterabadi berinala sila satura at satur.

<sup>+</sup> Law of the Lombards, book a. tit. 55. chap. 34.

<sup>\*</sup> Ab Italia proceribus est proclamatum, ut imperator fanctus, mutata lege, facinus indignum destrueret. Law of the Lombards, book 2. tit. 55. chap. 34.

<sup>+</sup> It was held in the year 967, in the presence of pope John XIIIand of the emperor Otho I.

<sup>¶</sup> Otho the Second's uncle, fon to Rodolphus, and king of Transjurian Burgundy.

<sup>◆</sup> In the year 988.

<sup>§</sup> Cum in boc ab omnibus imperiales aures pulsarentur. Law of the Lombards, book a. tit. 55. chap. 34.

confent, made a law, that whenever there happened any dispute about inheritances, and one of the parties infifted upon the legality of his title, and the other maintained its beingfalfe, the affair should be decided by combat; that the fame rule should be observed in contests relating to fiefs; and that the clergy should be subject to the same law, but should fight by their champions. Here we fee, that the nobility infifted on the trial by combat, because of the inconveniency of the proof introduced by the elergy; that notwithstanding the clamours of the nobility, the notoriousness of the abuse which called out loudly for redrefs, and the authority of Otho, who came into Italy to speak and act as master, still the clergy held out in two councils; in thort, that the joint concurrence of the nobility and princes having obliged the clergy to fubmit, the custom of judicial combats must have been confidered as a privilege of the nobility, as a barrier against injustice, and as a security of property, and from that very moment this custom must have gained ground. This was effected at a time when the power of the emperors was great, and that of the popes inconfiderable; at a time when the Otho's came to revive the dignity of the empire in Italy.

I SHALL make one reflection, which will corroborate what has been above faid, namely, that the custom of negative proofs produced that of judicial combats. The abuse complained of to the Ortho's was, that a person who was charged with having a false title to an estate, defended himself by a negative proof, declaring upon the gospels it was not false. What was it they did to reform this abuse? They revived the custom of judicial combats.

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I was in a hurry to speak of the constitution of Otho II. in order to give a clear idea of the disputes between the clergy and the laity of those times. There had been indeed a constitution of Lotharius I. of an earlier date, who, upon the same complaints and disputes, being desirous of securing the just possession of property, had ordained, that the notary should make oath that the deed or title was not forged; and if the notary should happen to die, the witnesses should be sworn who had signed it. The evil however still continued, till they were obliged at length to have recourse to the above-mentioned remedy.

BEFORE that time, I find, that in the general affemblies held by Charlemain, the nation reprefented to him , that in the actual state of things it was vastly difficult, but that either the accuser or the accused must forswear themselves; and that for this reason it was much better to revive the judicial combat; which was accordingly done.

THE usage of judicial combats gained ground among the Burgundians, and that of an oath was limited. Theodoric king of Italy suppressed the single combat among the Ostrogoths; and the laws of Chaindasuinthus and Recessuinthus seemed as if they would abolish the very idea of it. But these laws were so little respected in Narbonne Gaul, that they looked upon the legal duel as a privilege of the Goths\*.

<sup>\*</sup> In the law of the Lombards, book 2. tit. \$50 feet. 33. In the copy which Muratori made use of, it is attributed to the emperor Guido.

In the law of the Lombards, book 2. tit. 55. feet. 23.

<sup>#</sup> In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam Sunila. & insidelitatis argueretur, cum codem secundum legem pro-

THE Lombards who fubdued Italy, after the Oftrogoths had been destroyed by the Greeks, introduced the custom of judicial combat into that country; but their first laws gave a check to it . Charlemain 1, Lewis the Pious, and the Otho's, made diverse general constitutions, which we find inferted in the laws of the Lombards, and added to the Salic laws, whereby the practice of legal duels, at first in criminal and afterwards in civil cases, obtained a greater extent. They knew not what to do. The negative proof by oath had its inconveniencies; that of legal duels had likewise its inconveniencies; hence they often changed, according as the one or the other affected them-most.

On the one hand, the clergy were pleafed to fee, that in all fecular affairs, people were obliged to have recourse to the altar +; and on the other, a haughty nobility were fond of maintaining their rights by the fword.

I WOULD not have it inferred, that it was the clergy who introduced the custom so much complained of by the nobility. This custom was derived from the spirit of the Barbarian laws, and from the establishment of negative proofs. But PRODUCTION OF SHEET SHEET SHEET

priam, utpote quia uterque Gothus erat, equeffri pralio congressus aft & villus. The anonymous author of the life of Lewis the Pions,

<sup>◆</sup> See in the law of the Lombards, book 1. tit. 4. and tit. 9. fect; 23. and book 2. tit. 35. feet. 4. and 5. and tit. 55. feet. 1, 2, and 3. The regulations of Rotharis; and in sect. 15. that of Luitprandus.

<sup>1</sup> Ibid. book a. tit. 55. § 23.

The judicial oaths were made at that time in the churches and during the first race of our kings there was a chapel set spart in the royal palace, for the affairs that were to be thus decided. See the Formula's of Marculfus, book 1. chap. 38. The laws of the Ripuarians, tit. 59. § 4. tit. 65. § 5. The history of Gregory of Tours; and the Capitulary of the year 803. added to the Salic law.

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the the puaa practice that contributed to the impunity of such a number of criminals, having given some people reason to think it was proper to make use of the sanctity of the churches, in order to strike terror into the guilty, and to intimidate perjurers, the clergy maintained this usage, and the practice which attended it; for in other respects they were quite averse to negative proofs. We said in Beaumanoir, that this kind of proof was never allowed in ecclesiastic courts; which undoubtedly contributed greatly to its suppression, and to weaken, in this respect, the regulation of the codes of the Barbarian laws.

This will convince us more strongly of the connection between the usage of negative proofs, and that of judicial combats, of which I have said so much. The lay-tribunals admitted of both; and both were rejected by the ecclesiastical courts.

In chusing the trial by duel, the nation followed its military spirit; for while this was established as a divine decision, the trials by the cross, by cold or boiling waters, which had been likewise regarded in the same light, were abolished.

CHARLEMAIN ordained, that if any difference should arise between his children, they should be terminated by the judgment of the cross. Lewis the Pious\* confined this judgment to ecclesiastic affairs; his son Lotharius abolimed it in all cases nay, he suppressed + even the trial by cold water.

I Do not pretend to fay, that at a time when fo

<sup>◆</sup> Chap. 39. pag. atz. ingite end sto was benediktikanada

<sup>\*</sup> We find his constitutions inserted in the law of the Lombards, and at the end of the Salic laws.

<sup>+</sup> In a constitution inserted in the law of the Lombards, book a. tit. 55. § 31.

few usages, were univerfally received, these trials were not revived in some churches; especially as they are mentioned in a charter of Philip-Augustus: but I affirm, they were very seldom practifed. Beaumanoir 1, who lived at the time of S. Lewis, and a little after, enumerating the different kinds of trial, mentions that of judicial combat, but not a word of the others.

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A new Reason of the Distisse of the Salic and Roman

THE reasons that occasioned the disuse of the Salic and Roman laws, as also of the Capitularies, I have already spoken of; here I shall add, that the principal cause was the great extent given to judiciary combats.

As the Salic laws did not allow this custom, they became in some measure useless, and sell into oblivion. In like manner, the Romanlaws, which likewise rejected this custom, were laid aside: their whole attention was then taken up in establishing the law of judicial combats, and in forming a proper digest of the several cases that might happen on those occasions. The regulations of the Capitularies also became of manner of service. Thus it is, that such a number of laws lost all their authority, without our being able to tell the precise time in which it was lost; they fell into oblivion, and we cannot find any others that were substituted in their place.

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Cultom of Beauvoisis, chap. 39.

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Such a nation had no need of written laws; hence its written laws might very easily fall into difufe.

Is there happened to be any disputes between two parties, they had only to order a fingle combat. For this no great knowledge or abilities were requifite.

ALL civil and criminal actions are reduced to It is upon these facts they fought; and not only the substance of the affair, but also the incidents and imparlances were decided by combat, as Beaumanoir observes, who produces several instances.

I FIND that towards the beginning of the third race, the juriforndence of those times related entirely to perional quarrels, and was governed by the point of honour. If the judge was not obeyed, he infifted upon fatisfaction from the person that contemned his authority. At Bourges, if 1 the provoft had furnmoned a person, and he refufed to come: his way of proceeding was to well him, " I fent for thee, and thou didft not think it worth thy while to come; I demand therefore " fatisfaction for this thy contempt." Upon which they fought. Lewis the Fatreformed this custom.

THE custom of legal duels prevailed at + Orleans, even in all demands of debt. Lewis the Young declared, that this custom should take place only when the demand exceeded five fous. This ordi-

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<sup>4</sup> Chap. 61. pag. 309 and 310.

<sup>1</sup> Charter of Lewis the Fat, in the year 1145. in the collection of Ordinances. It is some it was abbitment to another soften by

<sup>·</sup> Ibid.

<sup>+</sup> Charter of Lewis the Young, in 1788. in the Collection of Orde Pools and a single and a single and a

nance was a local law; for in St. Lewis's time it was fufficient that the value was more than twelve deniers. Beaumanoir ¶ heard a gentleman of the law affirm, that formerly there had been a bad cuftom in France, of hiring a champion for a certain time to fight their battles in all causes. This shews that the custom of judiciary combats must have had at that time a prodigious extent.

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## Origin of the Point of Hanour.

E meet with inexplicable enigma's in the codes of the laws of the Barbarians. The law of the Frisians allows only half a sou in composition to a person that had been beaten with a stick; and yet for ever so small a wound it allows more. By the Salic law, if a freeman gave three blows with a stick to another freeman, he paid three sous; if he drew blood he was punished, as if he had wounded him with steel, and he paid sisteen sous: thus the punishment was proportioned to the greatness of the wound. The law of the Lombards + established different compositions for one, two, three, sour blows; and so on. At present, a single blow is equivalent to a hundred thousand.

THE constitution of Charlemain inferted in the law & of the Lombards, ordains, that those who were allowed the trial by combat, should fight with

See Beaumanoir, chap. 63. pag. 325.

<sup>¶</sup> See the cultom of Beauvoisis, cap. 28. pag. 203.

<sup>·</sup> Additio fapientum Willemari, tit. 5.

<sup>+</sup> Book r. tit. 6. fect. 3. ( ) 2 100 1 th sive A 30 11 11 11

<sup>§</sup> Book a. tit. 5. fect. 23.

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the tho ith clubs. Perhaps this was out of regard to the clergy; or probably, as the usage of legal duels gained ground, they wanted to render them less fanguinary. The capitulary of \* Lewis the Pious, allows the liberty of chusing to fight either with the sword or club. In process of time none but bondmen fought with the club +.

HERE I see the first rise and formation of the particular articles of our point of honour. The accuser began with declaring in the presence of the judge, that such a person had committed such an action; and the accused made answer, that he lied §; upon which the judge gave orders for the duel. It became then an established rule, that whenever a person had the lye given him, it was incumbent on him to sight.

UPON a man's declaring ¶ he would fight, he could not afterwards depart from his word; if he did, he was condemned to a penalty. Hence this rule enfued, that whenever a person had engaged his word, honour forbad him to recal it.

GENTLEMEN \*fought one another on horseback, and armed at all points; villains y fought on foot, and with clubs. Hence it followed that the club was looked upon as the instrument of insults and affronts; \* because to strike a man with it, was treating him like a villain.

<sup>\*</sup> Added to the Salic law in 819.

<sup>+</sup> See Beaumanoir, chap. 64. pag. 328.

<sup>§</sup> Ibid.

<sup>9</sup> See Beaumanoir, chap. 3. pag. 25. and 329.

See in regard to the arms of the combatants, Beaumanoir chap. 61. pag. 308. and chap. 64. pag. 348.

Y Ibid. chap. 64. pag. 328. See also the charters of S. Aubin of Anjou, quoted by Galland, pag. 263.

Among the Romans it was not infamous to be beaten with a slick, lege issus fustium. De iis qui notantur infamia.

None but villains fought with their r faces uncovered; fo that none but they could receive a blow on the face. Therefore a box on the ear became an injury that must be expiated with blood, because the person who received it had been treated as a villain.

THE several people of Germany were no less sensible than we, of the point of honour; nay, they were more so. Thus the most distant relations took a very considerable share to themselves in every assent, and on this all their codes are sounded. The law of the Lombards ordains, that, whosever goes attended with servants to beat a man by surprise, in order to load him with shame, and to render him ridiculous, should pay half the composition which he would owe if he had killed him †; and if through the same motive he tied or bound him, he should pay three quarters of the same composition.

LET us then conclude that our forefathers were extremely sensible of affronts; but that affronts of a particular kind, such as being struck with a certain instrument on a certain part of the body, and in a certain manner, were as yet unknown to them. All this was included in the affront of being beaten, and in this case the proportion of the excess constituted the greatness of the outrage.

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They had only the club and buckler. Beaumanoir, chap. 64. pag. 328.

<sup>\*</sup> Book r. eit. 6. feff. r.

<sup>+</sup> Book h tit. 6. fect. 2.

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A new Reflection upon the Point of Honour among A new Report

TT was a great infamy, fays Tacitus +, among the Germans, for a person to leave his bucket ler behind him in battle; for which reason ma-" ny after a misfortune of this kind have destroy-" ed themselves." Thus the ancient Salic law t allows a composition of fifteen sous to any person that had been injuriously reproached with having left his buckler behind him.

WHEN Charlemain \* amended the Salic law, he allowed in this case no more than three sous in composition. As this prince cannot be suspected of having had a defign to enervate the military discipline; it is plain that fuch a change was owing to that of arms, and that from this change of arms a great number of ulages derive their origin.

### CHAP. XXII.

Of the Manners relative to judicial Combats.

UR connexions with the fair fex are founded on the pleasure of enjoyment; on the happiness of loving and being beloved; and likewife on the ambition of pleafing the ladies, because they are the best judges of some of those things which constitute personal merit. This general de-

ards, or a new world in

<sup>4</sup> De moribus Germanorum.

<sup>+</sup> In the Pattus legis Salica.

<sup>\*</sup> We have both the ancient law and that which was amended by this prince.

fire of pleafing produces gallantry, which is not love itself, but the delicate, the volatile, the perpetual diffembler of love.

ACCORDING to the different circumstances of every country and age, love inclines more to one of those three things than to the other two. Now I maintain, that the prevailing spirit at the time of our judicial combats must naturally have been that of gallantry.

I FIND in the law of the Lombards, that if one of the two champions was found to have any magic herbs about him, the judge ordered them to be taken from him, and obliged him to swear he had no more. This law could be founded only on the vulgar opinion; it was fear, the supposed contriver of such a number of inventions, that made them imagine this kind of pressiges. As in the single combats, the champion were armed at all points; and as with heavy arms, both of the offensive and defensive kind, those of a particular temper and force were of great advantage; the notion of some champions having inchanted arms, must certainly have turned the brains of a great many people.

Hence arose the surprizing system of chivalry. The minds of all forts of people quickly imbibed these extravagant ideas. Then it was they had the romantic notions of knight-errants, necromancers, and of fairies, of winged or intelligent horses, of invisible or invulnerable men, of magicians who concerned themselves in the birth and education of great personages, of inchanted and disinchanted palaces, of a new world in the midst of the old one,

<sup>4</sup> Book z. tit, 55. fect. 11.

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KNIGHT-ERRANTS constantly in armour, in a part of the world abounding with castles, forts, and robbers, placed all their glory in punishing injustice, and in protecting weakness. Hence our romances are full of gallantry founded on the idea of love, joined to that of strength and protection.

Such was the original of gallantry, when they formed the notion of an extraordinary race of men, who at the fight of a virtuous and beautiful lady in diffress, were inclined to expose themselves to all hazards for her sake, and to endeavour to please her in the common actions of life.

Our romances flattered this defire of pleafing, and communicated to a part of Europe that spirit of gallantry, which we may venture to affirm was not much known to the ancients.

THE prodigious luxury of that immense city Rome encouraged sensible pleasures. The quietness of the plains of Greece gave rise to tender and amorous sentiments. The idea of knight-errants, protectors of the virtue and beauty of the fair-sex, was productive of gallantry.

This spirit was continued by the custom of tournaments, which uniting the rights of valour and love, added still a considerable importance to gallantry.

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See the Greek romances of the middle age.

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Of the Code of Laws on judicial Combats.

SOME perhaps will have a curiofity to fee this abominable custom of judiciary combat reduced to principle, and to find a code of such extraordinary laws. Men, though reasonable in the main, reduce their very prejudices to rule. Nothing was more opposite to good sense, than those combats: and yet when once this point was laid down, a kind of prudential management was used in carrying it into execution.

In order to be thoroughly acquainted with the jurisprudence of those times, it is necessary attentively to read the regulations of S. Lewis, who made such great changes in the judiciary order. Desontaines was cotemporary with that prince: Beaumanoir wrote after him; and the rest lived since his time. We must therefore look for the ancient practice in the amendments that have been made of it.

#### CHAP. XXIV.

Rules established in the judicial Combat.

HEN there happened \* to be several accusers, they were obliged to agree among themselves that the action might be carried on by a single prosecutor; and if they could not agree, the person before whom the action was brought, appointed one of them to prosecute the quarrel.

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<sup>4</sup> In the year 1283.

Beaumanoir, chap. 6, pag. 40. and 41.

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WHEN + a gentleman challenged a villain, he was obliged to prefent himfelf on foot with buckler and club; but if he came on horseback, and armed like a gentleman, they took his horse and his arms from him; and stripping him to his shirt, they compelled him to fight in that condition with the villain. Grayes off of borleved 195 defend des

BEFORE the combat the & magistrates ordered threebannsto be published. By the first the relations of the parties were commanded to retire; by the fecond the people were warned to be filent; and the third prohibited the giving any affiftance to either of the parties, under fevere penalties; nay, even on pain of death, if by this affiftance either of the combatants should happen to be overcome.

THE officers belonging to the civil magistrate + guarded the lift or inclosure where the battle was fought; and in case either of the parties declared himself desirous of peace, they took particular notice of the actual state in which things stood at that very moment, in order that they might be restored to the same situation, in case they did not come to an accommodation \*.

WHEN the pledges were received either for a crime or for false judgment, the parties could not make up the matter without the confent of the lord: and when one of the parties was vanquished, there could be no accommodation without the permissi-

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<sup>†</sup> Beaumanoir. chap. 64 pag. 318. the selection of the transfer of the

<sup>§</sup> Ibid. pag. 330.

<sup>4</sup> Ibid. chap. 64. pag. 330. Solding at 1 week of Resummen.

<sup>\*</sup> Ibid.

on of the count +, which had fome analogy to our letters of grace.

But if it happened to be a capital crime, and the lord, corrupted by presents, consented to an accommodation; he was obliged to pay a fine of fixty livres, and, and the right is he had of punishing the malefactor devolved to the count.

THERE were a great many people incapable either of offering, or of accepting battle. But liberty was given them in trial of the cause to chuse a champion; and that he might have a stronger interest in desending the party, in whose behalf he appeared, his hand was cut off if he lost the battle 4.

When capital laws were made in the last century against duels, perhaps it would have been sufficient to have deprived a warrior of his military capacity, by the loss of his hand; nothing in general being a greater mortification to mankind than to survive the loss of their character.

WHEN † in capital cases the duel was fought by champions, the parties were placed where they could not behold the battle; each was bound with the cord that was to be used at his execution, in case his champion was overcome.

THE person subdued in battle, did not always lose the point contested; if, for example \*, they

<sup>4</sup> The great vallals had particular privileges.

<sup>§</sup> Beaumanoir, chap. 64. pag. 330. fays, he lost his jurisdiction: rithese words in the authors of those days have not a general signification, but a signification limited to the affair in question. Defontaines, schap. 27. art. 29.

This custom, which we meet with in the capitularies, was still fublishing at the time of Beaumanoir. See chap. 61. page, 313,

<sup>+</sup> Beaumanoir, chap. 64. pag. 330

<sup>\* .1</sup>bid , chap . 61 . pag. 309.

fought on an imparlance, he lost only the impar-

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Of the Bounds prescribed to the Custom of judicial'
Combats.

HEN pledges of battle had been received upon a civil affair of small importance, the lord obliged the parties to withdraw them.

It a fact was notorious §; for example, if a man, had been affaffinated in the open market place, then there was neither a trial by witnesses, nor by combat; the judge gave his decision from the notoriety of the fact.

WHEN the court of a lord had often determined after the same manner, and the usage was thus known , the lord resused to grant the parties the privilege of duelling, in order that the usages might not be altered by the different success of the combats.

THEY were not allowed to infift upon duelling but for \* themselves, for some one belonging to their family or for their liege lord.

WHEN the accused had been acquitted +, another relation could not infift on fighting him; otherwise disputes would never be terminated.

If a person appeared again in public, whose relations, upon a supposition of his being murdered,

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<sup>§</sup> Beaumanoir, chap. 61, pag. 308. jbid. chap. 43, pag. 239.

<sup>+</sup> Ibid. chap. 61. psg. 314. See also Defontaines, chap. 22. ares.

<sup>·</sup> Ibid. chap. 63. page 322.

<sup>+</sup> Ibid.

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wanted to revenge his death; there was then no room for a combat: the same may be said & if by a notorious absence the fact was proved to be impossible.

IF a man I who had been mortally wounded, had disculpated before his death the person accused, and named another, they did not proceed to a duel; but if he had mentioned nobody, his declaration was regarded only as a forgiveness on his deathbed; the profecution was continued, and even among gentlemen they could make war against each other.

WHEN there was a war, and one of their relations had given or received pledges of battle, the right of war ceased; for then it was thought that the parties wanted to purfue the ordinary course of juffice; therefore he that continued the war would have been fentenced to repair all damages.

THUS the practice of judiciary combat had this advantage, that it was apt to change a general into a particular quarrel, to restore the courts of judicature to their authority, and to reduce to a civil state those who were no longer governed but by the law

of nations.

As there are a prodigious number of wife things that are managed in a very foolish manner; fo there are many foolish things that are very wisely conducted.

WHEN a man who was appealed of a crime, visibly shewed, that it had been committed by the appellant himself, there could be then no pledges of battle; for there is no criminal but would pre-

S Beaumanoir,

<sup>¶</sup> Ibid. pag. 323.

<sup>4</sup> Ibid. chap. 63. pag. 324.

fer a duel of uncertain event to a certain punish due to learly the hanner

THERE were no duels \* in affairs decided by arbiters, nor by ecclessaftic courts: nor in cases relating to women's dowries.

A WOMAN, fays Beaumanoir, cannot fight. If a woman appealed a perfon without naming her champion, the pledges of battle were not accepted. It was likewise requisite that a woman should be authorized + by her baron, that is, by her hufband, to appeal; but the might be appealed without this authority. pulpage consistents and race respond

Ir either the appellant, or the & appellee were under fifteen years of age, there could be no com. bat. They might order it, indeed, in disputes with regard to orphans, when their guardians or truftees were willing to run the risk of this procedure.

THE cases in which a bondman was permitted to fight, are, I think, as follows. He was allowed to fight another bondman; to fight a freeman, or even a gentleman, in case they were appellants; but if he was the appellant I himself, the others might refuse to fight; and even the bondman's lord had a right to take him out of the court. The bondman might by his lord's charter + or by usage, fight with any freeman; and the church \* pretended to from United the Color of the Color of the Color

Beaumanoir. pag. 325.

<sup>+</sup> Ibid. pag. 325.

<sup>5</sup> Ibid. chap. 63. pag 313. See also what I have said in the 18th fay to the party lie op cared for Before to pasod

<sup>¶</sup> Ibid. chap. 63 p. 322.

Defontaines, chap. 22. art. 7.

<sup>.</sup> Habeant bellandi et testissicandi licentiam. Charter of Lewis the Fat, in the year 1118.

this right for her bondmen, as a mark of respect to due to her by the laity.

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Of the judiciary Combat between one of the Parties, and one of the Witnesses.

person who saw a witness going to swear against him, might clude the second, by telling the judges, that his adversaries produced a salse and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. They troubled themselves no farther about the inquest; for if the witness was vanquished, it was decided, that the party had produced a salse witness, and he lost his cause.

I'm was necessary the second witness should be prevented from swearing; for if he had made his attestation, the affair would have been decided by the deposition of two witnesses. But by staying the second, the deposition of the first witness was not of the least use.

THE fecond witness being thus rejected, the party was not allowed to produce any others, but he lost his cause; in case, however, there had been no pledges of battle, he might produce other witnesses.

BEAUMANOIR observes +, that the witness might fay to the party he appeared for, before he made his deposition: "I do not care to fight for your "quarrel, nor to enter into any debate; but if you

<sup>†</sup> Charter of Lewis the Fat in the year 1118.

<sup>¶</sup> Chap. 61. pag. 315.

<sup>4</sup> Chap. 6. pag. 39, and 40.

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"are willing to fland by me, I am ready to tell the --" truth." The party was then obliged to fight for the witness, and if he happened to be vanquished. he did not lose his cause but the witness was revan a chieng the dream or very ignorant ment a best a law

THIS, I believe, was a limitation of the ancient: custom; and what makes me think so, is, that we find this cuftom of appealing the witnesses, establish -ed in the laws of the + Bavarians and & Burgundians without any reftriction. To the three as compared

I HAVE already taken notice of the constitution : of Gundebald, against which Agobard and S. Avitus + made fuch loud complaints. "When -" the accused (says this prince) produces witnesses : to fwear that he has not committed the crime, the "accuser may challenge one of the witnesses to a combat; for it is very just, that the perfor who. has offered to fwear, and has declared that he: "was certain of the truth, should make no difficul-"ty to maintain it." Thus the witheffes were deprived by this king of every kind of fubterfuge to avoid the judiciary combat, and built in holings. eas of buties . Indice manner the lard renounced

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Of the judicial Combat between one of the Parties, and one of the Lord's Peers. Appeal of falls Judgment. their other absolute of the resident

S the nature of judicial combats was to terminate the affair for ever, and was incom-

<sup>\*</sup> But if the battle was fought by champions, the champion that a was overcome had his hand cut. off.

<sup>†</sup> Tit. 16, felt, 2. 5 Fit. 454.

Letter to Lewis the Pious.

<sup>&</sup>amp; Life of S. Avinus

patible with 4 a new judgment, and new profecutions; an appeal, such as is established by the Roman and Canon laws, that is, to a superior court, in order to rejudge the proceedings of an inferior, was a thing the French were ignorant of.

This is a form of proceeding to which a warlike nation, entirely governed by the point of honour, was quite a stranger; and agreeably to this very spirit, the same methods \* were used against the judges, as was allowed against the parties.

An appeal among the people of this nation was a challenge to fight with arms, a challenge decided by blood, and not by an invitation to a paper quarrel, the knowledge of which was deferred to succeeding ages +.

THUS S. Lewis in his institutions, says, that an appeal includes both selony and iniquity. Thus Beaumanoir tells us, that if a vassal s wanted to make his complaint of any outrage committed against him by his lord, he was first obliged to denounce that he quitted his sies: after which he appealed to his lord paramount, and offered pledges of battle. In like manner the lord renounced the homage of his vassal, if he appealed him before the count.

A vassal to appeal his lord of false judgment, was telling him, that his sentence was unjust and malicious: now, to utter such words against his lord, was in some measure committing the crime of felony.

HENCE, inftead of bringing an appeal of false

Beaumanoir, chap. 2. pag. 22.

<sup>\*</sup> Ibid. chap. 61. pag. 312. & ch. 67. pag. 338.

<sup>4</sup> Book 2. chap. 15.

<sup>§</sup> Beaumanoir, chap. 61. pag. 310. and 311. and chap 67. pag. 337.

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judgment against the lord, who appointed and directed the court, they appealed the peers of whom the court itself was formed: by which means they avoided the crime of felony; for they insulted only their peers, with whom they could always account for the affiont.

It was a very + dangerous thing to appeal the peers of false judgment. If the party waited till judgment was pronounced, he was obliged to fight them all \*, when they offered to make good their judgment. If the appeal was made before all the judges had given their opinion, he was obliged to fight all who had agreed in their judgment. To avoid this danger, it was customary to petition the lord + to direct that each peer should give his opinion out loud; and when the first had pronounced, and the fecond was going to do the fame, the party told him that he was a liar, a knave, and a flanderer, and then he had to fight only with that peer.

DEFONDAINES & would have it, that before an appeal was made of false judgment, it was customary to let three judges pronounce; and he does not fay, that it was necessary to fight them all three, much less that there was any obligation to fight all, those who had declared themselves of the same opinion. Thefe differences arise from this, that there were few usages exactly in all parts the same; Beaumanoir gives an account of what paffed in the county of Clermont; and Defontaines of what was practifed in Vermandois.

hall the many by the southern seed built &

<sup>4</sup> Beaumanoir, chap. 61. pag. 313.

<sup>†</sup> Ibid, chap. 61. pag. 314. § Chap. 22. art. 1. 10, and 11. he fays only, that each of them was allowed a fmall fine. E 6

WHEN to one of the peers had declared that he would maintain the judgment, the judge commanded pledges of battle to be given, and likewife took fecurity of the appellant, that he would maintain his appeal. But the peer who was appealed gave no fecurity, because he was the lord's vassal, and was obliged to defend the appeal, or to pay the lord a fine of fixty livres.

Is the \* appellant did not prove that the judgment was false, he paid the lord a fine of fixty livres, the same fine + to the peer whom he had appealed, and as much to every one of those who had openly consented to the judgment.

WHEN a person violently suspected of a capital crime, had been taken and condemned, he could make no appeal § of false judgment: for he would always appeal either to prolong his life, or to get an absolute discharge.

Ir a person ¶ said that the judgment was salse and bad, and did not offer to make his words good, that is to sight, he was condemned to a fine of six sous, if a gentleman; and to sive sous, if a bondman, for the injurious expressions he had uttered.

The judges or peers \* who were vanquished, forseited neither life nor limbs; but the person who appealed them was punished with death, if it happened to be a capital crime \*:

Defontaines, chap. 22. art, 9.

<sup>+</sup> Defontaines, chap. 22. art. 9.

<sup>\$</sup> Beaumanoir, chap. 61. pag. 316.

A Ibid. chap. 16. pag. 514. and Defontaines, chap. 22. art. 21.

<sup>4</sup> Defentaines, chap. 22 art. 7.

<sup>\*</sup> See Defontaines, chap 21. art. 11, and 12 and following, who

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This manner of appealing the peers of false judgment, was to avoid appealing the lord himfelf. If the lord had no peers, or had not a sufficient number, he might, at his own expence, hire peers of his lord paramount; but these peers were not obliged to pronounce judgment if they did not like it; they might declare, that they were come only to give their opinion: in that particular case the lord himself pronounced sentence as judge; and if an appeal of salse judgment was made against him, it was his business to stand the appeal.

If the lord happened § to be so very poor as not to be able to hire peers of his paramount, or if he neglected to ask for them, or the paramount resused to give them, then as the lord could not judge by himself, and as no body was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

This, I believe, was one of the chief causes of the separation between the jurisdiction and the fief, from whence arose that maxim of the French lawyers, The sief is one thing, and the jurisdiction another. For as there were an infinite number of peers who had no subordinate vassals under them, they were incapable of holding their court; all affairs were then brought before their lord paramount, and they lost the privilege of pronouncing judgment,

diffinguishes the cases in which the appellant of false judgment loses his life, the point contested, or only the imparlance.

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Beaumanoir, chap. 62. pag. 323. Defontaines, chap. 22.

The count was not obliged to lend any. Beaumanoir, chap, 67.

<sup>+</sup> No body can pass judgment in his court, says Beaumanoir, chap-67. p. 336. and 337.

<sup>§</sup> Ibil. chap. 62. pag. 322.

because they had neither power nor will to claim it.

ALL the peers \* who had agreed to the judgment, were obliged to be present when it was pronounced, that they might follow one another, and say Tes to the person who, wanting to make an appeal of salse judgment, asked them whether they sollowed; for Desontaines says \*, " that it is an " affair of curtesy and loyalty, and there is no such " thing as evasion or delay." From hence, I imagine, arose the custom still sollowed in England, of obliging the jury to be all unanimous in their verdict in cases relating to life and death.

JUDGMENT was therefore given according to the opinion of the majority: and if there was an equal division, sentence was pronounced, in criminal cases, in favour of the accused; in cases of debt, in favour of the debtor; and in cases of inheritance, in favour of the defendant.

DEFONTAINES observes +, that a peer could not excuse himself by saying that he would not sit in court if there were only sour §, or if the whole number, or at least the wisest part, were not present. This is just as if he were to say in the heat of an engagement, that he would not assist his lord, because he had not all his vassals with him. But it was the lord's business to cause his court to be respected, and to chuse the most valiant and knowing of his tenants. This I mention in order to shew the duty of vassals, which was to sight and to give judgment; and such indeed was this duty, that to give judgment was all the same as to sight.

Defontaines, chap. 22. art. 27. and 28.

<sup>\*</sup> Ibid. art. 18. + Chap. 11. art. 37.

<sup>5</sup> This number at least was necessary. Defontaines, chap. 21, art. 36.

IT was lawful for a lord who went to law with his vaffal in his own court, and was cast, to appeal one of his tenants of false judgment. But as the latter owed a respect to his lord for the fealty he had vowed, and the lord on the other hand owed benevolence to his vaffal for the fealty accepted; it was customary to make a distinction between the lords affirming in general, that the judgment was false and unjust, and imputing personal \* prevarications to his tenant. In the former case he affronted his own court, and in some measure himfelf, fo that there was no room for pledges of battle. But there was room in the latter, because he attacked his vaffal's honour; and the person vanquished was deprived of life and property, in order to maintain the public tranquillity, we block when W

THIS distinction, which was necessary in that particular cafe, had afterwards a greater extent. Beaumanoir fays, that when the appellant of false judgment attacked one of the peers by perfonal imputation; battle enfued; but if he attacked only the judgment, the peer appealed was at liberty + to determine the dispute either by battle, or by law. But as the prevailing spirit in Beaumanoir's time was to reftrain the utage of judicial combats, and as this liberty which had been granted to the peer appealed, of defending the judgment by combator not, is equally contrary to the ideas of honour eftablished in those days, and to the obligation the vastal lay under of defending his lord's jurifdiction; Fum apt to imagine that this distinction of Beaumanoir's wasowing to a new regulation among the French. one

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<sup>+</sup> Beaumanoir, chap, 16 91 pag. 33 72000 for smoot 9 1bid. ads

<sup>†</sup> Beaumanoir, chap. 67. pag. 337, and 338.

I WOULD not have it thought, that all appeals of false judgment were decided by battle; it fared with this appeal as with all others. The reader may recollect the exceptions mentioned in the 2 gth chapter. Here it was the business of the superior court to examine whether it was proper to withdraw the pledges of battle or not.

THERE could be no appeal of false judgment against the king's court; because as there was no one equal to the king, no one could appeal him; and as the king had no superior, none could appeal from his court.

This fundamental regulation, which was necesfary as a political law, lessened also as a civil law, the abuses of the judicial proceedings of those times. When a lord was assaid a that his court would be appealed of salse judgment, or perceived that they were determined to appeal; if justice required there should be no appeal, he might petition for peers from the king's court, who could not be appealed of salse judgment. Thus king Philip, says Desontaines salse the his whole council to judge an affair in the court of the Abbot of Corbey.

Ir the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him: but if there were intermediate lords, he had recourfe to his paramount, removing from one lord to another, till he came to the fovereign.

The vs notwiths and ing they had not in those days either the practice of even the idea of our modern appeals, yet they had reconstitute to the king, who was the source from whence all those rivers flowed, and the sea into which they seturned.

Defontaines, chap. 22.

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#### CHAP. XXVIII.

Of the Appeal of Default of Justice ...

THE appeal of default of justice was when the court of a particular lord deferred, evaded, or refused to de justice to the parties.

DURING the time of our princes of the second race, though the count had several officers under him, their person was subordinate, but not their jurisdiction. These officers in their court-days, assess, or placita, gave judgment in the last refort as the count himself; all the difference consisted in the division of the jurisdiction. For example, the count had the power of condemning to death, of judging of liberty and of the restitution of goods, which the centenarii had not.

For the same reason there were higher canses reserved to the king; namely, those which directly concerned the political order of the state. Such were the disputes between bishops, abbots, counts, and other grandees, which were determined by the monarch, together with the great validis †.

What some authors have advanced, namely, that an appeal lay from the count to the king's commissions or Missis Dominicus, is not well grounded. The count and the Missis had an equal juris-

Third capitulary of the year 812, art. 3. edition of Balazius, p. 497. and of Charles the Bald, added to the law of the Lombards, book 4. art. 3.

<sup>\*</sup> Third capitulary of the year 814. art. 3, edition of Beluzina, p.

<sup>+</sup> Cum fidelibus. Capitulary of Lewis the Pious, edition of Ba-

diction independent of each other: The whole difference ¶ was that the Missus held his Placita or affizes four months in the year, and the count the other eight.

Is a person who had been condemned at an affize \*, demanded to have his cause tried over again, and was afterwards cast, he paid a fine of fifteen sous, or received fifteen blows from the judges who had decided the affair.

When the counts or the king's commissaries did not find themselves able to bring the great lords to reason, they made them give bail or security \*, that they would appear in the king's court: this was to try the cause, and not to rejudge it. I find in the capitulary of Metz †, a law by which the appeal of salse judgment to the king's court is established, and all other kinds of appeal are proscribed and punished.

If they refused to submit to the judgment of the sheriffs §, and made no complaint, they were imprisoned till they had submitted: but if they complained, they were conducted under a proper guard before the king, and the affair was examined in his court.

THERE could be hardly any room then for an appeal of default of justice. For instead of its be-

See the capitulary of Charles the Bald, added to the law of the Lombards, book 2. art. 3.

Third capitulary of the year 812. art. 8.

Placitum.

<sup>\*</sup> This appears by the formula's, charters, and the capitularies.

<sup>+</sup> In the year 757. edition of Baluzius, pag. 180. art, 9. and 10, and the Synod apud Vernas in the year 755. art 29 edition of Baluzius, pag. 175. These two capitularies were made under king Pepin.

<sup>5</sup> The officers under the count, Scalini.

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ing customary in those days to complain, that the counts and others who had a right of holding assizes, were not exact in discharging his duty; it was a general complaint that they were too exact. Hence we find such numbers of ordinances, by which the counts and all other officers of justice are forbid to hold their assize above thrice a year. It was not so necessary to chastise their indolence, as to check their activity.

But, after a prodigious number of petty lordfhips had been formed, and different degrees of vaffalage established, the neglect of certain vasfals in holding their courts gave rise to this kind of appeal •; especially as very considerable profits accrued to the lord paramount from the several fines.

As the custom of judicial combats gained every day more ground, there were places, cases, and times, in which it was difficult to assemble the peers, and of course, in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable æra in our history; because most of the wars of those days were imputed to a violation of the political law; as the cause, or at least the pretence of modern wars, is the infringement of the law of nations.

BEAUMANOIR P fays, that in case of default of justice, battle was not allowed: the reasons are these; i. they could not challenge the lord, because of the respect due to his person; neither could they

\* 18:1. one . 141. \*

<sup>+</sup> See the law of the Lombards, book a. tit. 52, art. 22.

There are infrances of appeals of default of justice to early as the time of Philip Augustus.

<sup>---</sup> Chap. 61. pag. 315.

challenge the lord's peers, because the case was clear, and they had only to reckon the days of the farmous, or of the other delays; there had been no judgment passed, consequently there could be no appeal of fasse judgment: in a word, the crime of the peers offended the lord as well as the party, and it was against rule that there should be battle between the lord and his peers.

But + as the default was proved by witnesses before the superior court; the witnesses might be challenged, and then neither the lord nor his court were offended.

In case the default was owing to the lord's tenants or peers by deferring justice, or by evading judgment after past delays, then these peers were appealed of default of justice before the paramount; and if they were cast, they is paid a fine to their lord. The latter could not give them any affiftance; on the contrary, he seized their sief till they had each paid a fine of sixty livres.

which was the case whenever there happened not to be a sufficient number of peers in his court to pass judgment, or when he had not assembled his tenants or appointed somebody in his room to assemble them, an appeal might be made of the default before the lord paramount; but then the party and not the lord was summoned, because of the respect due to the latter.

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cause was remanded to him, and he was like-

<sup>+</sup> Beaumanoir, chap. 6s. pag. 315.

<sup>5</sup> Defontaines, chap. 32. art. 24.

<sup>•</sup> Ibid. art. 31.

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wise paid a fine of fixty livres. But if the default was proved, the penalty inflicted on him was to lose the trial of the cause, which was to be then determined in the superior court. And indeed, the complaint of default was made with no other view.

which never happened but upon disputes relative to the sief; after letting all the delays pass, the lord himself s was summoned before the peers in the king's name, whose permission was necessary on that occasion. The peers did not make the summons in their own name, because they could not summon their lord, but they could summon for their lord.

SOMETIMES ¶ the appeal of default of justice, was followed by an appeal of false judgment, when the lord had caused judgment to be passed, not-withstanding the default.

THE vaffal who had wrongfully appealed his lord of default of justice, was sentenced to pay a fine according to his lord's pleasure.

<sup>&</sup>amp; Beaumanoir, chap. 61. pag. 312.

<sup>-</sup> Defontaines, chap. 21, art. 29.

<sup>+</sup> This was the case in the famous difference between the lord of Nele and Joan counters of Flanders, under the reign of Lewis VIII. He sued her in her own court of Flanders, and summoned her to give judgment within forty days, and afterwards appealed in default of justice to the king's court. She answered, he should be judged by his peers in Flanders. The king's court determined that he should not be remanded, and that the counters should be summoned.

<sup>§</sup> Defontaines, chap. 34.

Defontaines, chap. 21. art. 9.

<sup>¶</sup> Beaumanoir, chap. 61. pag. 318.

Beaumanoir, chap. 61. pag. 312. But he that was neither tenant nor vassal to the lord, paid only a fine of fixty livres. Ibid.

The inhabitants of Gaunt † had appealed the earl of Flanders of default of justice before the king, for having delayed to give judgment in his own court. Upon examination it was found, that he had used sewer delays than even the custom of the country allowed. They were therefore remanded to him; upon which their effects to the value of fixty thousand livres were seized. They returned to the king's court in order to have the fine moderated; but it was decided that the earl might infist upon the fine, and even upon more if he pleased. Beaumanoir was present at those judgments.

4. In other disputes which the lord might have with his vassal, with regard to the body or honour of the latter, or to goods that did not belong to the sief, there was no room for an appeal of default of justice; because the cause was not tried in the lord's court, but in that of the paramount: vassals, says Desontaines +, having no power to give judgment on the body of their lord.

I HAVE been at some trouble to give a clear idea of those things, which are so obscure and confused in ancient authors, that to disentangle them from the chaos in which they were involved, may be reckoned a new discovery.

not be required, and that has proved a call by larger and.

vo- Scottmanuis, chap. 6. par 224. Sec. he et al met net net net estat une voll. 1 de la conte voll. 1 de la conte voll. 1 de la conte voll.

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\* Besteriannie, chap. 51 mp 388.

Beaumanoir, chap. 51. pag. 318. 2 med and beaumanoir chap. 51.

chap. 21. art. 35, as particular the state of grid only of state in

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## Epoch of the reign of St. Lewis.

been already oblerved CT. Lewis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance + he published on that account, and & by the institutions.

But he did not suppress them in the courts of his \* barons, except in the case of appeal of false

judgment.

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application flowers and A VASSAL could not appeal the court of his lord of false judgment, without demanding a judicial combat against the judges who had pronounced fentence. But St. Lewis I introduced the practice of appealing a false judgment without fighting, a change that may be reckoned a kind of revolution.

HE declared +, that there should be no appeal of false judgment in the lordships of his demesne, because it was a crime of felony. If it was a kind of felony against the lord, by a much stronger reafon it was felony against the king. But he confented they might demand an amendment + of the judgments paffed in his courts; not because they were false or iniquitous, but because they did some prejudice §. On the contrary, he ordained, that

+ In the year 1260.

-1 - Ame of -Fig. as gived "

S Book 1. chap. 2 and 7. and book 2. chap. 10 and 11.

<sup>\*</sup> As appears every where in the inflitutions, &c. and Beaumanoir, chap. 61. pag. 309. And principal Astronias ten and frage ser

Institutions, book 1, chap. 6. and book 2. chap. 15,

<sup>4</sup> Ibid, book 2. chap. is.

<sup>+</sup> Ibid. book 1. chap. 78. and book 3. chap. 15.

<sup>&</sup>amp; Ibid. book 1. chap. 78.

they should be obliged to make an appeal of false judgment against the court of the barons , in case

of any complaint.

It was not allowed by the inflitutions, as has been already observed, to bring an appeal of false judgment against the courts in the king's demesses. They were obliged to demand an amendment before the same court: and in case the bailiss resuled the amendment demanded, the king gave leave to make an appeal to his court; or rather interpreting the institutions by themselves, to present him a request or petition.

WITH respect to the courts of the lords, St. Lewis by permitting them to be appealed of false judgment, would have the cause brought ¶ before the royal tribunal, or that of the lord paramount, not 4 to be decided by duel, but by witnesses, purfuant to a certain form of proceeding, the rules of

which he laid down in the inflitutions §.

Thus, whether they could falfify the judgment, as in the court of the barons; or whether they could not falfify, as in the court of his demesne, he ordained that they might appeal, without the hazard of a duel.

DEFONTAINES \* gives us the two first instances he ever saw, in which they proceeded thus without a legal duel: one, in a cause tried at the court

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<sup>-</sup> Inflitutions, book 2. chap. 15.

<sup>&</sup>quot; Ibid, book 2. chap. 78.

<sup>--</sup> Ibid. chap. 15. b & a miles + lane a quel

The appeal was not admitted. Institutions, book at chap, 151

Book at chap. 6. and 47. and book at chap. 25. and Beaumanoir, chap. 22. pag. 38.

<sup>5</sup> Book r. chap. r, a, and j. the at a gale a decided

<sup>\*</sup> Chap 22. art. 16 and 17.

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of St. Quintin, which belonged to the king's demesne; and the other, in the court of Ponthieu, where the count who was present, opposed the ancient jurisprudence: but these two causes were decided by law.

HERE, perhaps, it will be afked, why St. Lewis ordained for the courts of his barons a different form of proceeding from that which he had eftablished in the courts of his demesne? The reason is this: when St. Lewis made the regulation for the courts of his demesnes, he was not checked or confined in his views: but he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts, unless the party was willing to expose himself to the dangers of an appeal of false judgment. St. Lewis preserved the usage of this appeal; but he ordained, that it should be made without a judicial combat, that is, in order to render the change more infenfible, he suppressed the thing and continued the terms.

This regulation was not univerfally received in the courts of the lords. Beaumanoir † fays, that in his time there were two ways of trying caufes; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they chused; but when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds , that the count of Clermont followed the new practice, whilst his vasfals kept to the old one, but that it was in his power to re-establish the ancient practice whenever he

<sup>+</sup> Chap. 61. pag. 309.

<sup>4</sup> Chap. 61. pag. 309.

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chused, otherwise he would have less authority than his vassals.

IT is proper here to observe that France was at that time divided into the country of the king's demenne, and that which was called the country of the barons, or the baronies; and, to make use of the terms of St. Lewis's institutions, into the country under obedience to the king, and the country out of his obedience. When the king made ordinances for the country of his demefne, he employed his own fingle authority. But when he published any ordinances that concerned also the country of his barons, these were - made in concert with them, or fealed and fubscribed by them : otherwise the barons received or refused them, according as they feemed conducive to the good of their baronies. The rear-vassals were upon the fame terms with the great-vaffals. Now the in-Ritutions were not made with the confent of the lords, though they regulated matters which to them were of great importance: but they were received only by those who believed they would redound to their advantage. Robert, fon of St. Lewis, received them in his county of Clermont; yet his vaffals did not think proper to conform to this practice.

<sup>-</sup> See Beaumanoir, Defontaines, and the Institutions, book 2. chap. 20, 11, 15, and others.

See the ordinances at the beginning of the third race in the collection of Lauriere, particularly, those of Philip Augustus on ecclesiastic jurisdiction; that of Lewis VIII. concerning the Jews; and the charters related by Mr. Brussel; especially that of St. Lewis, on the lease and recovery of lands, and the feodal majority of young women, tom. 2. book 3. pag. 35, and ibid. The ordinance of Philip Augustus, pag. 7.

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#### cream made buingeredge, a cost ude altragely Observations on Appeals.

Apprehend that appeals, which were challenges to a combat, must have been made immediately on the spot. "If the party leaves the court without appealing, fays Beaumanoir +, he loses " his appeal, and the judgment stands good." This continued still in force, even after all the restrictions of - judicial combat.

#### CHAP. XXXI.

Continuation of the same Subject.

HE villain could not bring an appeal of false judgment against the court of his lord. This we learn from Defontaines +, and is confirmed moreover by the institutions \*. Hence Defontaines of fays, " between the lord and his villain " there is no other judge but God."

IT was the custom of judicial combats that deprived the villains of the privilege of appealing their lord's court of false judgment. And so true is this, that those villains &, who by charter or cu-

<sup>4</sup> Chap. 33. pag. 627. ibid. Chap. 63. page 312.

<sup>-</sup> See the Institutions of St. Lewis, book 2. chap. 15. the Ordinance of Charles VII. in the year 1453.

<sup>†</sup> Chap, 25, art. 21 and 22,

<sup>\*</sup> Book 1. chap, 136.

<sup>-</sup>c. Chap. 2, art. 8.

<sup>§</sup> Defontaines, chap. 22. art. 7. This article and the 21 of the 22d chapter of the fame author, have been hitherto very badly explained. Defontaines does not oppose the judgment of the lord to

from had a right to fight, had likewise the privilege of appealing their lord's court of false judgment, even though the peers who tried them were \* gentlemen: and Desontaines \* proposes expedients to gentlemen, in order to avoid the scandal of fighting with a villain, by whom he had been appealed of false judgment.

As the practice of judicial combats began to decline, and the usage of new appeals to be introduced, it was reckoned unjust that freemen should have a remedy against the injustice of the court of their lords, and the villains should not; hence the parliament received their appeals all the same as

those of freemen.

#### CHAP. XXXII.

Continuation of the Same Subject.

HEN an appeal of false judgment was brought against the lord's court, the lord appeared in person before his paramount, to defend the judgment of his court. In like manner in the appeal of the default of justice, the party summoned before the lord paramount, brought his lord along with him, so that if the default was not proved, he might recover his jurisdiction.

In process of time, as the practice observed in those two particular cases was become general, by the introduction of all kinds of appeals, it seemed

that of the gentleman, because it was the same thing; but he opposes the common villain to him who had the privilege of fighting

<sup>\*</sup> Gentlemen may be always appointed judges. Defontaines, chap. 21, art. 48.

<sup>+</sup> Chap. 22. art. 14.

<sup>»-</sup> Desontaines, chap. 21. art. 33.

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very extraordinary that the lord should be obliged to spend his whole life in strange tribunals, and for other people's affairs. Philip of Valois § ordained, that none but the bailiss should be summoned; and when the usage of appeals became still more frequent, the parties were obliged to defend the appeal: the fact of the judge became that of the party.

I TOOK notice that in the † appeal of default of justice, the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as party \*, which was become a very common practice \*, he paid a fine of fixty livres to the king, or to the paramount, before whom the appeal was brought. From thence arose the custom, after appeals had been generally received, of fining the lord upon the amendment of the sentence of his judge; a custom which lasted a long time, and was confirmed by the order of Rousillon, but fell, at length, to the ground, through its own absurdity.

#### CHAP. XXXIII.

## Continuation of the fame Subject ..

IN the practice of judicial combats, the person who had appealed one of the judges of salse judgment, might lose his § cause by the combat,

<sup>§</sup> In the year 1332.

year 1402. Somme rurale, book 1, p, 19 and 20.

<sup>†</sup> See chap. 30.

Beaumanoir, chap. 61. pag. 312, and 318,

<sup>-</sup> Ibid.

Defontaines, chap. 21. art. 14.

but could not possibly gain it. And indeed the party who had a judgment in his favour, ought not to have been deprived of it by another man's act. The appellant, therefore, who had gained the battle, was obliged to fight also against the adverse party: not in order to know whether the judgment was good or bad (for this judgment was out of the case, being reversed by the combat) but to determine whether the demand was just or not; and it was on this new point they fought. From thence proceeds our manner of pronouncing decrees," The " court annuls the appeal; the court annuls the " appeal, and the judgment against which the ap-" peal was brought." In effect, when the person who had made the appeal of false judgment, happened to be subdued, the appeal was reversed; when he proved victorious, both the judgment and the appeal were reverfed: then they were obliged to proceed to a new judgment. no. 2847 has somit

This is so far true, that when the cause was tried by inquests, this manner of pronouncing did not take place: witness what M. de la Roche Flavin \* says, namely, that the chamber of inquests could not use this form at the beginning of its creation.

#### CHAP. XXXIV.

In what manner the Proceedings at Law became fecret.

DUELS had introduced a public form of proceeding, fo that both the attack and the defence were equally known. "The witnesses, fays:

Of the parliaments of France, book 11, chap, 16.

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"Beaumanoir \*, ought to give their testimony in

BOUTILLIER's commentator says, he had learnt of ancient practitioners, and from some old manufeript law books, that criminal processes were formerly carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how to write; a thing in those days very common. The custom of writing fixes the ideas, and preserves the secret; but when this custom is laid aside, nothing but the notoriety of the proceeding is capable of fixing those ideas.

AND as uncertainty † might easily arise in respect to what had been tried by vassals, they could
therefore refresh their memory every time they held
a court, by what was called proceedings on record
. In that case it was not permitted to challenge
the witnesses to combat; for then there would be
no end of disputes.

In process of time a secret form of proceeding was introduced. Every thing had before been public; every thing now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the attorney-general; and this is the present practice. The first form of proceeding was conformable to the government of that time, as the new form was proper to the government fince established.

BOUTILLIER's commentator fixes the epoch of this change to the ordinance in the year 1539. I

<sup>\*</sup> Chap. 61. pag. 315.

<sup>+</sup> As Beaumanoir fays, chap. 39. pag. 309.

<sup>&</sup>amp; They proved by witnesses what had been already done, faid, or decreed in court.

am apt to imagine that the change was made infensibly, and passed from one lordship to another, in proportion as the lords renounced the ancient form of judging, and that derived from the institutions of St. Lewis was improved. And indeed, Beaumanoir says , that witnesses were publicly heard only in cases in which it was allowed to give pledges of battle: in others, they were heard insecret, and their depositions were reduced to writing. The proceedings became therefore secret, when they ceased to give pledges of battle.

#### CHAP. XXXV.

Of the Costs.

N former times no one was condemned in the temporal courts of France to the payment of costs +. The party cast was sufficiently punished by pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat, it followed that the party condemned and deprived of life and fortune, was punished as much as he could be : and in the other cases of judicial combat, there were fines fometimes fixed, and fometimes dependant on the disposition of the lord, which were fufficient to make people be afraid of the confequences of fuits. The fame-may be faid of causes that were not decided by combat. As the lord had the chief profits, so he was likewise at the chief expence, either to affemble his peers, or to enable them to proceed to judgment.

<sup>4</sup> Chap. 39. pag. 218

<sup>+</sup> Defontaines in his counsel, chap. 22. art. 3 and 8, and Beaumanois, chap. 33. Institutions, book 1. chap. 90.

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fides, as disputes were generally determined on the fpot, and without that infinite number of writings which afterwards followed, there was no necessity of allowing costs to the parties.

THE custom of appeals naturally introduced that of giving costs. Thus Defontaines \* fays, that when they appealed by written law, that is when they followed the new laws of St. Lewis, they gave costs; but that is the ufual custom, which did not permit them to appeal without falfifying the judg-ment, no costs were allowed. They obtained only a fine, and the poffession for a year and a day of: the thing contested, if the cause was remanded tothe lord.

Bur when the number of appeals increased from the new facility of appealing +; when by the frequent usage of those appeals from one court to another, the parties were continually removed from: the place of their residence; when the new method of proceeding increased and perpetuated the: fuits; when the art of eluding the very justest demands was refined; when the parties at law knews how to fly only in order to be followed; when actions: proved destructive, and pleas easy; when the arguments were loft in whole volumes of writings; when the kingdom was filled with members of the law, who were strangers to justice; when knavery found no encouragement from mean practitioners, though discountenanced by the law; then it was necessary to deter litigious people by the fear of costs. They were obliged to pay costs for the judgment, and for the means they had employed?

<sup>·</sup> Chap. 22. art. 8.

<sup>+</sup> At present when they are so inclined to appeal, fays Boutillier. Semme rurale, book 1, tit, 3. pag. 16.

to elude it. Charles the Fair made a general ordinance on that subject \*.

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#### C H A P. XXXVI.

### Of the public Profecutor.

As by the Salic, Ripuarian, and other barbarrous laws, crimes were punished with pecuniary fines; they had not in those days, as we
have at present, a public officer who has the care of
criminal prosecutions. And indeed, the issue of
all causes being reduced to the reparation of damages; every prosecution was in some measure civil, and might be managed by any one. On the
other hand, the Roman law had popular forms for
the prosecution of crimes, which were inconsistent
with the office of a public prosecutor.

THE custom of judicial combats was no less opposite to this idea; for who is it that would chuse to make himself every man's champion against all the world?

I FIND in the collection of formula's, inferted by Muratori in the laws of the Lombards, that under our princes of the fecond race there was an advocate for the public \* profecutor. But whoever chuses to read the entire collection of those formula's, will find that there was a total difference between such officers and those we now call the public profecutor, our attorney-generals, our king's sollicitors, or our sollicitors for the nobility. The former were rather agents to the public for the management of political and domestic affairs, than for

<sup>\*</sup> In the year 1324.

<sup>+</sup> Advocatus de parte publica.

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the civil. And indeed we do not find in those formula's that they were intrusted with criminal profecutions, or with causes relating to minors, to churches, or to the condition of persons.

I said that the establishment of a public profecutor was repugnant to the cultom of judicial combats. I find notwithstanding, in one of those formula's, an advocate for the public profecutor, who had the liberty to fight. Muratori has placed it just after the constitution + of Henry I. for which it was made. In this constitution it is said, "That " if any man kills his father, his brother, or any of " his other relations, he shall lose their succession, " which shall pass to the other relations, and his-" own shall go to the exchequer." Now it was in: fuing for the fuccession which had devolved to the exchequer, that the advocate for the public profeoutor, by whom its rights were defended, had the privilege of fighting : This case fell within the general rule. ing of the control of authorities to

WE see in those formula's the advocate for the public prosecutor proceeding against a person who had taken a robber, but had not brought him before the count; against another, who had raised an insurrection or tumult against the count; against + another who had saved a man's life whom the count had ordered to be put to death; against the advocate of some churches, whom the count had

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See the constitution and this formula in the fecond volume of the Historians of Italy, pag. 175.

<sup>§</sup> Collection of Muratori, pag. 104, on the 88th law of Charle-main, book 1. tit. 26. fect. 78.

<sup>-</sup> Another formula, ibid, pag. 87.

<sup>† 1</sup>bid. pag, 104.

A Ibid. pag. 95.

ordered to bring a robber before him, but had not obeyed; against another who had revealed the king's secret to strangers; against another who with open violence had attacked the emperor's commissary; against another who had been guilty of contempt to the emperor's rescripts, and he was prosecuted either by the emperor's advocate, or by the emperor himself; against another who resused to accept of the prince's coin: in short, this advocate sued for things, which by the law were adjudged to the exchequer §.

But, in criminal causes, we never meet with the advocate for the public prosecutor; not even where duels are used; not even in the case of incendiaries; not even when the judge is killed on his bench; not even in causes relating to the condition of persons, to liberty, and slavery +.

THESE formula's are made, not only for the laws of the Lombards, but also for the capitularies added to them; so that we have no reason to doubt of their giving us the practice observed with respect to this subject under our princes of the second race.

Profecutor must have ended with our second race of

Another formula in the second volume of the Historians of Italy, pag. 88.

<sup>-</sup> Ibid. pag. 131,

<sup>1</sup> Ibid. pag. 132.

<sup>♦</sup> Ibid, pag. 132.

<sup>5</sup> Ibid. pag. 137.

<sup>-</sup> Ibid. pag. 147. Ibid. pag. 168.

<sup>\*</sup> Ibid. pag. 134.

<sup>†</sup> Ibid. pag. 167.

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kings, in the same manner as the king's commissioners in the provinces; because there were nolonger any counts in the provinces to hold the affizes, and of course there were no more of those officers, whose principal function was to support the authority of the counts.

As the usage of combats was become more frequent under the third race, it did not allow of any such thing as a public prosecutor. Hence Boutillier, in his Somme Rurale, speaking of the officers of justice, takes notice only of the bailists, the peers and serjeants. See the institutions , and Beaumanoir & concerning the manner in which prosecutions were managed in those days.

Jeind in the laws of James II. king of Masjorca, a creation of the king's attorney general with the very fame functions as are exercised at present by the officers of that name amongst us. It is manifest that this office was not instituted till we had changed the form of our judiciary proceedings.

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Book 1. chap. 1, and book 2. chap, 11 and 13.

<sup>§</sup> Chap. 1. &c. 61.

<sup>+</sup> See these laws in the lives of the saints of the month of June; tom. 3. pag. 26.

<sup>\*</sup> Qui continue nostram sacram curiam sequi teneatur, instituatur qui falta & causas in ipsa curia promoveat atque prosequatur.

### C H A P. XXXVII.

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In what manner the Institutions of St. Lewis fell into Oblivion.

IT was the fate of the institutions, that their origin, progress and decline, were comprised within a very short period.

I SHALL make a few reflections upon this fubject. The code we have now under the name of St. Lewis's institutions, was never defigned as a law for the whole kingdom, though fuch a defign is mentioned in the preface. This compilement is a general code, which determines all points concerning civil affairs, to the disposal of property by will or otherwife, the dowries and advantages of women, the emoluments and privileges of fiefs, with the affairs relating to the police, &c. Now to give a general body of civil laws, at a time when each city, town or village had its customs, was attempting to subvert in one moment all the particular laws then in force in every part of the kingdom. To reduce all the particular customs to a general one, would be a very inconsiderate thing, even at prefent when our princes find every where the most passive obedience. But if it be a rule that we ought not to change when the inconveniencies are equal to the advantages, much less should we change when the advantages are fmall and the inconveniencies immense. Now if we attentively confider the fituation which the kingdom was in at that time, when every lord was puffed up with the nction of his fovereignty and power, we shall find that to attempt a general alteration of the renever enter into the heads of those who were then in the administration.

WHAT I have been faying, proves likewife that this code of institutions was not confirmed in parliament by the barons and magistrates of the kingdom, as is mentioned in a manuscript of the townhouse of Amiens, quoted by Mons. Ducange \*. We find in other manuscripts that this code was given by St. Lewis in the year 1 270, before he fet out for Tunis. But this fact is not truer than the other; for St. Lewis fet out upon that expedition in 1260, as Monf. Ducange observes: from whence he concludes, that this code might have been published in his absence. But this, I say, is impossible. How can St. Lewis be thought to have pitched upon the time of his absence for transacting an affair which would have been the feed of troubles. and might have produced not only changes, but revolutions? An enterprize of that kind had need. more than any other, of being closely purfued, and could not be the work of a feeble regency, composed moreover of lords, whose interest it was that it should not succeed. These were Matthew about of St. Denis, Simon of Clermont count of Nelle. and in case of death Philip bishop of Evreux, and John count of Ponthieu. We have feen above to that the count of Ponthieu opposed the execution of a new judiciary order in his lordship.

THIRDLY, I affirm it to be very probable, that the code now extant is quite a different thing from St. Lewis's inflitutions. It cites the inflitutions; therefore it is a comment upon the inflitutions,

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<sup>·</sup> Preface to the Institutions.

<sup>†</sup> Chap. 29.

and not the institutions themselves. Besides, Beaumanoir, who often mentions St. Lewis's institutions, quotes only some particular laws of that prince, and not his compilement. Desontaines , who wrote in that prince's reign, makes mention of the two first times that his institutions on judicial proceedings were put in execution, as of a thing long since elapsed. The institutions of St. Lewis were prior therefore to the compilement Lam now speaking of, which in rigour, and adopting the erroneous presaces inserted by some ignorant persons in that work, could not have been published before the last year of St. Lewis, or even not till after his death.

### C H A P. XXXVIII.

and will est to life with the or threat proportion for the

. Continuation of the same Subject.

at present under the name of St. Lewis's institutions? What is this obscure, confused, and ambiguous code, where the French law is continually mixed with the Roman, where a legislator speaks and yet we see a civilian, where we find a complete digest of all cases and points of the civil law? To understand this thoroughly, we must transfer ourselves in imagination to those times.

ST. Lewis feeing the abuses in the jurisprudence of his time, endeavoured to give the people a dislike to it: With this view he made several regulations for the court of his demesses and for those of his barons. And such was his success, that Beau-

<sup>4</sup> See above, chap. 300

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manoir , who wrote a short time after the death of that prince, informs us, that the manner of trying causes which had been established by St. Lewis, obtained in a great number of the courts of the barons.

Thus this prince attained his end, though his regulations for the courts of the lords were not defigned as a general law for the kingdom, but as a model which every one might follow, and would even find his advantage in it. He removed the bad practice by shewing them a better. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more natural, more reasonable, more conformable to morality, to religion, to the public tranquillity, and to the security of person and property; this form was soon adopted, and the other rejected.

To allure when it is rash to constrain, to win by pleasing means when it is improper to exert authority, stews the man of abilities. Reason has a natural, and even a tyrannical sway; it meets with resistance, but this very resistance constitutes its triumph; for after a short struggle it commands an intire submission.

ST. Lewis, in order to give a distaste of the French jurisprudence, caused the books of the Roman law to be translated; by which means they were made known to the lawyers of those times. Desontaines, who is the oldest - law writer we have, made great use of the Roman laws. His work is in some measure a result of the ancient. French jurisprudence, of the laws or institutions of

<sup>4</sup> Chap. 61. pag. 309.

<sup>-</sup> He says of himself, in his prologue, Nus luy enprit onques mais cette chose dont j'ay.

St. Lewis, and of the Roman law. Beaumanoir made very little use of the latter; but he reconciled the ancient French laws to the regulations of St. Lewis.

I HAVE a notion therefore that the law book, known by the name of the inflitutions, was compiled by fome bailiffs, with the fame defign as that of the authors of those two works, and particularly of Defontaines. The title of this work mentions, that it is written according to the usage of Paris, Orleans, and the court of Barony; and the preamble fays that it treats of the usages of the whole. kingdom, and of Anjou, and of the court of Barony. It is obvious, that this was made for Paris, Orleans, and Anjou, as the works of Beaumanoir and Defontaines were framed for the counties of Clermont and Vermandois; and as it appears from Beaumanoir, that divers laws of St. Lewis had been received in the courts of barony, the compiler was in the right to fay, that his work " related likewife to those courts.

It is manifest, that the person who composed this work, compiled the customs of the country, together with the laws and institutions of St. Lewis. This is a very valuable work, because it contains the ancient customs of Anjou, the institutions of St. Lewis, as they were then in use; and, in a word, the whole practice of the ancient French law.

THE difference between this work, and those of

Nothing so vague as the title and prologue. At first they are the customs of Paris, Orleans, and the court of Barony; then they are the customs of all the lay courts of the kingdom, and of the provosthips of France; at length, they are the customs of the whole kingdom, Anjou, and the court of Barony.

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Defontaines and Beaumanoir, is its speaking in imperative terms as a legislator; and this might be right, since it was a medley of written customs and laws.

THERE was an intrinsic defect in this compilement; it formed an amphibious code, in which the French and Roman laws were mixed, and where things were joined that were no way relative, but frequently contradictory to each other.

I AM not ignorant, that the French courts of vassals or peers, the judgments without power of appealing to another tribunal, the manner of pronouncing sentence by these words, I condemn\*, or, I absolve, had some conformity to the popular judgments of the Romans. But they made very little use of that ancient jurisprudence; they rather chose that which was afterwards introduced by the emperor, in order to regulate, limit, correct, and extend the French jurisprudence.

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Continuation of the Same Subject.

THE judiciary forms introduced by St. Lewis fell into difuse. This prince had not so much in view the thing itself, that is, the best manner of trying causes, as the best manner of supplying the ancient practice of trial. The chief intent was to give a disrelish of the ancient jurisprudence, and the next to form a new one. But when the inconveniencies of the latter appeared, another soon succeeded.

THE institutions of St. Lewis did not therefore

<sup>\*</sup> Institutions, book 2, chap. 15.

Thus the institutions produced effects which could hardly be expected from a master-piece of legislation. To prepare great changes, sometimes whole ages are requisite; the events ripen, and the revolutions follow.

THE parliament judged in the last resort of almost all the affairs of the kingdom. Before , it took cognizance only of disputes between the dukes, counts, barons, bishops, abbots, or between the king and his vassals +, rather in the relation they had to the political, than to the civil order. They were soon obliged to render it permanent, whereas it used to be held only a few times in a year: and, in short, a great number were created, in order to be sufficient for the decision of all manner of causes.

As foon as the parliament became a fixed body, they began to compile its decree. John de Monluc, under the reign of Philip the Fair, made a

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conveniencies of the latter apparently it it is before

See Du Tillet on the court of peers. See also Laroche, Flavin, book 1, chap. 3. Budeus and Paulus Emilius.

h Other causes were decided by ordinary tribunals.

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collection, which, at present, is known by the name of the Olim registers.

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In what manner the judiciary Forms were borrowed from the Decretals.

ilet det ion bib ied an vi DUT how comes it, some will fay, that when the institutions were laid afide, the judicial forms of the canon law should be preferred to those of the Roman? It was because they had continually before their eyes the ecclefiaftic courts, which followed the forms of the canon law, and they knew of no court that followed those of the Roman law. Besides, the limits of the spiritual and temporal jurisdiction were at that time very little understood; there were \* people + who fued indifferently, and causes that were tried indifferently, in either court. It feems & as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgment of feudal matters , and of fuch crimes committed by laymen as did not relate to religion. For - if on the account of conventions and contracts, they had occasion to fue in a temporal court, the parties might, of their own

<sup>-</sup> See the president Henault's excellent abridgment of the history of France in the year 1313.

Beaumanoir, chap. 11. pag. 458.

<sup>†</sup> Widows, eroiles, &c. Ibid. pag. 38.

S See the whole eleventh chapter of Beaumanoir.

<sup>11</sup> The spiritual tribunals had even laid hold of these, under the pretext of the oath, as may be seen by the samous Concordat between Philip Augustus, the clergy and the barons, which is to be found in the ordinances of Lauriere.

<sup>-</sup>o- Beaumanoir, chap 11. pag. 60.

accord, proceed before the spiritual tribunal; and as the latter had not a power to oblige the temporal court to execute the sentence, they commanded submission by means of excommunications. Under those circumstances, when they wanted to change the course of proceedings in the temporal court, they took that of the spiritual tribunals, because they knew it; but did not meddle with that of the Roman law, because they were strangers to it: for in point of practice, people know only what is really practised.

#### CHAP. XLI.

Flux and Reflux of the esclefiastical and temporal Jurisdiction,

digious number of lords, it was an easy matter for the ecclesiastic jurisdiction to gain daily a greater extent. But as the ecclesiastic courts weakened those of the lords, and contributed thereby to give strength to the royal jurisdiction, the latter gradually checked the jurisdiction of the clergy. The parliament, which in its form of proceedings had adopted whatever was good and useful in the spiritual courts, soon perceived nothing else but the abuses which had crept into those tribunals; and as the royal jurisdiction daily gained ground, it grew every day more capable of correcting those abuses. And indeed, they were intolerable: without enumerating them, I shall refer the reader to

<sup>♣</sup> See Boutillier, Somme rurale, tit. 9. what persons are incapable of suing in a temporal court; and Feaumanoir, chap. 11. page. 56. and the regulations of Philip Augustus upon this subject; as also the regulations between Philip Augustus, the clergy, and the barons.

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Beaumanoir, to Boutillier, and to the ordinances of our kings. I shall mention only two, in which, the public interest was more directly concerned. These abuses we know by the decrees that reformed them; they had been introduced in the times of the darkest ignorance, and upon the breaking out of the first gleam of light, they disappeared. From the filence of the clergy it may be prefumed, that they forwarded this reformation: which, confidering the nature of the human mind, deferves commendation. Every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was deprived of the facrament, and of christian burial. If he died intestate, his relations were obliged to prevail upon the bishop, that he would, jointly with them, name proper arbiters, to determine what fum the deceased ought to have given, in case he had made a will. People could not lie together the first night of their nuptials, or even the two following nights, without having previously purchafed leave: these, indeed, were the three best nights to chuse; for as to the others, they were not worth much. All this was redreffed by the parliament: we find in the -gloffary of the French law, by Ragau, the decree which is published + against the bishop of Amiens.

I RETURN to the beginning of my chapter. Whenever we observe in any age or government, the different bodies of the state endeavouring to augment their authority, and to take particular advantages of each other, we should be often mistaken were we to confider their encroachments as an

<sup>--</sup> In the word Testamentary executors.

<sup>+</sup> The 19th of March, 1409.

evident mark of their corruption. Through a fatality inseparable from human nature, moderation in great men is very rare: and as it is always much cafier to push on force in the direction in which it moves, than to stop its movement, so in the superior class of the people, it is less difficult, perhaps, find men extremely virtuous, than extremely prudent.

THE human mind feels fuch an exquisite pleafure in the exercise of power; even those who are lovers of virtue are fo excessively fond of themfelves, that there is no man fo happy, as not to have still reason to mistrust his honest intentions; and, indeed, our actions depend on fo many things. that it is far easier to do good, than to do it well.

### CHAP. XLII.

The Revival of the Roman Law, and the Refult thereof. Change in the Tribunals.

PON the discovery of Justinian's digest towards the year 1137, the Roman law feemed to rife out of its ashes. Schools were then established in Italy, where it was publicly taught; they - had already the Justinian code, and the Novella. I mentioned before, that this code had been fo favourably received in that country, as to eclipfe the law of the Lombards.

THE Italian doctors brought the law of Justinian into France, where they had only + the Theo-

In Italy they followed Justinian's code: hence Pope John VIII. in his constitution published after the synod of Troyes, mentions this eode, not because it was known in France, but because he knew it himfelf; and his constitution was general.

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dofian code; because Justinian's laws were not made & till after the fettlement of the Barbarians in Gaul. This law met with fome opposition; but ir flood its ground notwithstanding the excommunications of the popes, who supported their own canons. St. Lewis endeavoured to bring it into repute by the translations of Justinian's works, made by his command, which are still in manuscript in our libraries; and I have already observed, that they made great use of them in compiling the institutions. Philip the Fair \* ordered the laws of Justinian to be taught, only as written reason, in those provinces of France that were governed by customs; and they were adopted as a law in those provinces where the Roman laws had been received.

I HAVE already observed, that the manner of proceeding by judicial combat, required very little knowledge in the judges; disputes were decided according to the custom of each place, and to a few simple customs received by tradition. In Beaumanoir's time there were two different ways of administering justice; in some places they tried by peers +, in others by bailiss: in following the former way, the peers gave judgment according

<sup>§</sup> This emperor's ecde was published towards the year 530.

<sup>+</sup> Decretals, book s. tit. de privilegiis, capite super specula.

By a charter in the year 1312, in favour of the university of Orleans, quoted by Du Tillet.

Cultoms of Beauvoilis, chap. 1. of the office of bailiffs.

<sup>†</sup> Among the common people the burghers were tried by burghers, as the feudatary tenants were tried by one another. See la Thanmaffiere, chap. 19.

<sup>||</sup> Thus all requests began with these words: My lard judge, it is customary in your court, &c. as appears from the formula quoted by Boutillier, Somme rurale, book A. tit. ar.

sto the practice of their court; in the latter it was the prodes bomines, or old men, who pointed out this same practice to the bailiff. This whole proceeding required neither learning, capacity, nor study. But when the dark code of the institutions appeared; when the Roman law was translated, and taught in public schools; when a certain art of procedure and jurisprudence began to be formed; when practitioners and civilians were feen to rife; the peers and the prodes homines were no longer capable of judging: the peers began to withdraw from the lords tribunals; and the lords were very little inclined to affemble them; especially as the new form of trial, instead of being a folemn proceeding, agreeable to the nobility, and interesting to a warlike people, was become a course of pleading, which they neither understood, nor wanted to learn. The custom of trying by peers began to be less used; that of trying by bailiffs to be more fo; the bailiffs did not give + judg-

The change was infensible: we meet with trials by peers even in Boutillier's time, who lived in the year 1402, which is the date of his will: He gives this formula, book 1. tit 21. "Sire Juge, en "ma justice baste, moyenne & basse, que j'ai en tel lieu, cour, plaids, baillis, hommes feodaux & sergens." Yet nothing but feodal matters were tried any longer by the peers. Ibid. book 1. tit. 1. pag. 16.

<sup>†</sup> As appears by the formula of the letters which their lord used to give them, quoted by Boutillier, Somme rurale, book 1. tit. 14. which is proved likewise by Beaumanoir, custom of Beauvoisis, chap. 1. of the balliss; they only directed the proceedings. "The bailiss" is obliged in the presence of the peers to take down the words of those who plead, and to ask the parties whether they are willing to have judgment given according to the reasons alledged; and if they say, yes, my lord; the bailiss ought to oblize the peers to give judgment." See also the Institutions of St. Lewis, book 1. chap. 105. and book 2. chap. 15. "Li Jage, si ne doit pas faire le jugement."

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ment themselves, they summed up the evidence and pronounced the judgment of the prodes homines; but the latter being no longer capable of judging, the bailiffs themselves gave judgment.

This was effected fo much the easier, as they had before their eyes the practice of the ecclesiastic courts; the canon and new civil law both con-

curred alike to abolish the peers.

Thus fell the custom hitherto constantly observed in the French monarchy, that judgment
should not be pronounced by a single person, as
may be seen in the Salic laws, the capitularies, and
in the first \* law-writers under the third race. The
contrary abuse, which obtains only in local jurisdictions, has been moderated, and in some measure
redressed, by introducing in many places a judge's
deputy, whom he consults, and who represents the
ancient prodes homines by the obligation the judge is
under of taking two graduates, in cases that deserve
a corporal punishment; and, in short, it is become
of no manner of effect by the extreme facility of
appeals.

### C H A P. XLIII.

Continuation of the same Subject.

THUS there was no law to prohibit the lords from holding their courts themselves; none to abolish the functions of their peers; none to ordain the creation of bailiss; none to give them the power of judging. All this was effected insensibly, and by the very necessity of the thing. The know-

<sup>\*</sup> Beaumanoir, chap. 67. pag. 336. and chap. 61. pag. 315. and 316. The Institutions, book 2. chap. 15.

ledge of the Roman law, the decrees of the courts, the new digest of the customs, required a study of which the nobility and illiterate people were incapable.

THE only ordinance we have upon this subject is that which obliged the lords to chuse their bailiss from among the laity. It is a mistake to look upon this as a law of their creation; for it says no such thing. Besides, the intention of the legislator is determined by the reasons assigned in the ordinance: in order "that the bailiss may be "punished for their prevarications, it is necessa-"ry they be taken from the order of the laity." The immunities of the clergy in those days are very well known.

We must not imagine that the privileges which the nobility formerly enjoyed, and of which they are now divested, were taken from them as usurpations: no, many of those privileges were lost through neglect, and others were given up, because as various changes had been introduced in the course of so many ages, they were inconsistent with those changes.

### CHAP. XLIV.

### Of the Proof by Witnesses.

THE judges, who had no other rule to go by than the usages, inquired very often by witmesses into every cause that was brought before them.

THE usage of judicial combats beginning to de-

It was published in the year :1287.

<sup>&</sup>amp; Ut fi ibi delinquant, superiores fui possint animadvertere in cofdem,

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eline, they made their inquests in writing. But a verbal proof committed to writing, is never more than a verbal proof; fo that this only augmented the expences of law proceedings. Regulations were then made which rendered most of those inquests \* useless; public registers were established, which ascertained most facts, as nobility, age, legitimacy, and marriage. Writing is a witness very hard to corrupt; the customs were therefore reduced to writing. All this is very reasonable; it is much easier to go and see in the baptismal register, whether Peter is the fon of Paul, than to prove this fact by a todious inquest. When there are a great number of ulages in a country, it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made, which prohibited the admitting of the proof by witnesses, for a debt execeding an hundred livres, unless there was the beginning of a proof in writing.

### C H A P. XLV. toonsimmental

Of the Customs of Frances

of the direct countries of the case of the ca-

RANCE, as has been already observed, was governed by unwritten customs; and the particular customs of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir , and fo particular a law, that this author, who is looked upon as a luminary, and

Prologue to the custom of Beauvoisis.

<sup>\*</sup> See in what manner age and parentage were proved. Institutions, book r. chap. 71. and 72.

a very great luminary, of those times, says, he does not believe that throughout the whole kingdom there were two lordships entirely governed by the fame law.

THIS prodigious diversity had a two-fold origin. With respect to the first, the reader may recollect what has been already faid concerning it in the chapter of local customs: and as to the fecond, we meet with it in the different events of legal duels; it being natural that a continual feries of fortuitous cases must have been productive of new customs. de liver to and not in the liver

THESE customs were preserved in the memory of old men; but infenfibly laws or written customs were formed. note code; then the medit utilive

1. AT the beginning + of the third race the kings gave not only particular charters, but alfo general ones, in the manner above-explained; fuch are the inftitutions of Philip Augustus, and those made by St. Lewis. In like manner the great vaffals, in concurrence with the lords who held under them, granted certain charters or establishments, according to particular circumstances at the affizes of the duchies or counties: fuch were the affize of Godfrey count of Britany, on the division of the nobles; the customs of Normandy granted by duke Ralph; the customs of Champagne, given by king Theobald; the laws of Simon count of Montfort, and others. This produced fome written laws, and even more general ones than those they had before. sool ainday rindius buff

2. AT the commencement of the third race, almost all the common people were bond-men; but

cas, book a clab + cap

<sup>---</sup> Chap. 12.

Profesure to the callest of States Line + See the collection of ordinances, by Lauriere.

there were feveral reasons which afterwards determined the kings and lords to infranchise them.

The lords by infranchifing their bond-men gave them property; it was necessary therefore to give them civil laws, in order to regulate the disposal of that property. But by infranchifing their bondmen, they likewise deprived themselves of their property; there was a necessity therefore of regulating the rights which they reserved to themselves, as an equivalent for that property. Both these things were regulated by the charters of infranchisement; those charters formed a part of our customs, and this part was reduced to writing.

3. UNDER the reign of St. Lewis and of the fucceeding princes, some able practitioners, such as Desontaines, Beaumanoir, and others, committed the customs of the bailiwicks to writing. Their design was rather to give the course of judicial proceedings, than the usages of their time in respect to the disposal of property. But the whole is there, and though these particular authors have no authority but what they derive from the truth and notoriety of the things they speak of, yet there is not the least doubt but they contributed greatly to the restoration of our antient French jurisprudence. Such was in those days our common law.

WE are come now to the grand epocha. Charles VII. and his fuccessors caused the different local customs throughout the kingdom to be reduced to writing; and prescribed set forms to be observed at their digesting. Now as this digesting was made through all the provinces, and as people came from each lordship to declare in the general assembly of the province the written or unwritten usages of

each place, endeavours were used to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully preserved. Thus our usages were characterized in a threefold manner; they were committed to writing, they were made more general, and they received the stamp of the royal authority.

MANY of these customs having been digested arnew, several changes were made either in suppressing whatever was incompatible with the actual practice of the law, or in adding several things drawn from this practice.

THOUGH the common law is confidered amongst us as in some measure opposite to the Roman, infomuch that these two laws divide the different territories; it is nevertheless true that several regulations of the Roman law entered into our customs, especially when they made the new digefts, at a time not very diftant from ours, when this law was the principal study of those who were defigned for civil employments; at a time when it was not usual for people to boast of not knowing what it was their duty to know, and of knowing what they ought not to know; at a time when a quickness of understanding was made more subfervient towards learning, than pretending to, a profession; and when a continual pursuit of amusements was not even the characteristic of women.

I SHOULD have been more diffuse at the con-

This was observed at the digesting of the customs of Berry and of Paris. See la Thaumassiere, chap. 3.

ral details, should have traced all the insensible changes which from the opening of appeals, have formed the great Corpus of our French Jurisprudence. But this would have been ingrafting one large work upon another. I am like that antiquarian . who fet out from his own country, arrived in Egypt, cast an eye on the pyramids, and returned home.

### 4. In the Spectator,

Bar is, and merhiphy Limes materialists with a world with me office view than to prove it; the feirle of a legislator or gir to be that of modewhen a little in the same and problem books de contard in fully common with apprendigati

Ten fer forms of julies are necellary to liberor that the auditer of them might be to great as to he commerce to the cast of the very laws that coadd to suo to short of the most sua of flavorsomer species made but of hogolite of these species eramining or they were in be de hoped by examining too much.

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### BOOK XXIX.

nd details, though have traces all the

Of the Manner of composing Laws.

### CHAP. I.

Of the Spirit of a Legislator.

Say it, and methinks I have undertaken this work with no other view than to prove it; the spirit of a legislator ought to be that of moderation; political, like moral evil, continually lying between two extremes. Let us produce an example.

THE set forms of justice are necessary to liberty; but the number of them might be so great as to be contrary to the end of the very laws that established them; processes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be destroyed by examining too much.

THE citizens would lose their liberty and security; the accusers would no longer have any means to convict, nor the accused to justify themselves.

## CHAP. II.

Continuation of the Same Subject.

ECILIUS, in Aulus Gellius , speaking of the law of the twelve tables, which allowed the creditor to cut the insolvent debtor into pieces, justifies it even by its cruelty, which | prevented people from borrowing beyond their ability of paying. Shall then the cruellest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

## CHAP. III.

That the Laws which seem to deviate from the Views of the Legislator, are often agreeable to them.

Aid to the first or the the of the

THE law of Solon which declared those perfons infamous who espoused no side in an insurrection, seemed very extraordinary; but we ought to consider the circumstances in which Greece was at that time. It was divided into very small states: and there was reason to apprehend, lest in a republic, torn by intestine divisions, the soberest part should keep retired, in consequence of which, things might be carried to extremity.

In the feditions raifed in those petty states, the

\* Book 22: chap. r. a a a land ton a val 3 ft

I Cecilins fays, that he never faw nor read of an inflance, in which this punishment had been inflicted; but it is likely, that no fuch punishment ever was established; the opinion of some civilians, that the law of the twelve tables meant only the division of the money arising from the sale of the debtor, seems very probable.

bulk of the citizens either made or engaged in the quarrel. In our large monarchies parties are formed by a few, and the people chuse to live peaceably. In the latter case it is natural to call back the seditious to the bulk of the citizens, and not these to the seditious: in the other it is necessary to oblige the small number of prudent people to enter among the seditious: it is thus the fermentation of one liquor may be stopped by a single drop of another.

## c H A P. IV.

Of the Laws contrary to the Views of the Le-

HERE are laws so little understood by the legislator, as to be contrary to the very end he proposed. Those who made this regulation among the French, that when one of the two competitors died, the benefice should devolve to the survivor, undoubtedly had in view the extinction of quarrels: but the very reverse falls out, we see the clergy at variance every day, and like English mastiffs worsying one another to death.

### CHAP. V.

Continuation of the fame Subject.

THE law I am going to speak of, is to be found in this oath preserved by Æschines +; "I swear that I will never destroy a town of the Amphictyons, and that I will not divert the

<sup>+</sup> De falfo Legatione. 10 ab sil to the sid sid tout

"course of its running waters; if any nation shall-" prefume to do fuch a thing, I will declare war " against them, and will destroy their towns." The last article of this law, which feems to confirm the first, is really contrary to it: Amphictybe destroyed, and yet his law paves the way for their destruction. In order to establish a proper law of nations among the Greeks, they ought to have been accustomed early to think it a barbarousthing to destroy a Greek town; confequently, they: ought not even to ruin the destroyers. Amphictyon's law was just; but it was not prudent; this appears even from the abuse made of it. Did not: Philip assume the power of destroying towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other punishments; he might have ordained, for example, that a certain number of the magistrates. of the destroying town, or of the chiefs of the infringing army, should be punished with death; that the destroying nation should cease for a while to enjoy the privileges of the Greeks; that they should pay a fine till the town was rebuilt. The law ought, above all things, to aim at the reparation of damages.

### CHAP. VI.

The Laws which appear the same, have not at all

ASAR made a law to prohibit people from keeping above fixty festerces in their houses.

This law was confidered at Rome as extremely proper for reconciling the debtors to their creditors; because by obliging the rich to lend to the poor, they enabled the latter to pay their debts. A law of the same nature made in France at the time of the fystem, proved very fatal; because it was enacted under a most frightful situation. After depriving people of all possible means of laying outtheir money, they ftripped them even of the last resource of keeping it at home; which was the fame as taking it from them by open violence. Cæfar's law was intended to make the money circulate; the French ministers design was to draw all the morney into one hand. The former gave either lands or mortgages on private people for the money: the latter proposed in lieu of money, nothing but effects which were of no value, and could have none by their very nature, because the law obliged people to accept of them.

# dish alsies for a P. VII.

Continuation of the same Subject. Necessity of composing Laws in a proper Manner.

THE law of oftracism was established at Athens, at Argos , and at Syracuse. At Syracuse it was productive of numberless mischiess, because it was imprudently enacted. The principal citizens banished one another by holding the leaf of a fig-tree ; in their hands; so that those who had any kind of merit withdrew from public affairs. At Athens, where the legislator was sensible of the

Aristot. Repub. lib. 5. chap. 3.

<sup>†</sup> Plutarch, life of Dionysius.

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proper extent and limits of his law, oftracism proved an admirable regulation: they never condemned more than one person at a time; and such a number of suffrages were requisite for passing this sentence, that it was very difficult for them to banish a person whose absence was not necessary to the state.

THE power of banishing was exercised only every fifth year: and indeed, as the offracism was designed against none but great personages who threatened the state with danger, it ought not to have been the transaction of every day.

## short and and an empiriment description of the slow

That Laws which appear the same, were not always made through the same Motive.

In France they have received most of the Roman laws on substitutions, but through quite a different motive from the Romans. Among the latter the inheritance was accompanied with certain facrifices, which were to be performed by the inheritor, and were regulated by the pontifical law; hence it was, that they reckoned it dishonourable to die without heirs, that they made slaves their heirs, and that they devised substitutions. Of this we have a very strong proof in the vulgarsubstitution, which was the first invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the

The coffeen was their amedian of T

<sup>•</sup> When the inheritance was too much incumbered, they cluded the pontifical law by certain fales, from whence come the words fine facris baredit as.

estate in a samily of the same name, but to find:
fome person that would accept of it.

### CHAP. IX.

That the Greek and Roman Laws punished Suicide, but not through the same Motive.

Man, fays Plato, who has killed one nearly: related to him, that is himself, not by an order of the magistrate, not to avoid ignominy, but through pusillanimity, shall be punished. The Roman law punished this action when it was not committed through pusillanimity, through weariness of life, through impatience in pain, but from a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

PLATO's law was formed upon the Lacedæmonian inflictations, where the orders of the magistrate: were absolute, where shame was the greatest of calamities, and pusillanimity the greatest of orimes. The Romans had no longer those refined ideas; theirs was only a fiscal law:

DURING the time of the republic, there was no law at Rome against suicides: this action is always considered by their historians in a favourable light, and we never meet with any punishment inslicted; upon those who committed it.

UNDER the first emperors, the great families of Rome were always destroyed by criminal profecutions. The custom was then introduced of preventing judgment by a voluntary death. In this

<sup>+</sup> Book 9. of laws.

d:

they found a great advantage: they had \*an honourable interment, and their wills were executed, because there was no law against suicides. But when the emperors became as avaricious as cruel, they deprived those who destroyed themselves of the means of preferving their effates, by rendering it: criminal for a person to make away with himself. through a criminal remorfe.

WHAT I have been faying of the motive of the emperors, is fo true, that they confented + that the estates of fuicides should not be confiscated, when the crime for which they killed themselves was not punished with confiscation.

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That Laws which feem contrary, proceed fometimes: shall ash of from the fame Spirit. god basiguel

Nour times we give fummons to people in their own houses; but this was not allowed among by of criminals, have but, seen aliced the Romans.

A SUMMONS: was a 1. violent action, and a: kind of a warrant for feizing the \* body; hence it was no more allowed to fummon a person in his: own house, than it is now allowed to arrest a perfon in his own house for debt. the wicaclies; on the contrary tables received

and the work to be a district.

<sup>\*</sup> Borum qui de fe flatuebant bumabantur corpora, manebant teffamen. to, pretium festinandi, Tacit, salve , al d atto no collonisti

<sup>+</sup> Rescript of the emperor Pius in the 3d law, sect. a. and a. f. de bonis eorum qui ante fent. mortem fibi consciverunt.

<sup>4</sup> Log. 18. ff. de in jus vocando.

<sup>1</sup> See the law of the 12. tables.

Rapit in jus, Horace, fatir. 9. hence they could not fummon thoseto whom a particular respect was due.

denouses trulo who defined the

BOTH the Roman & and our laws admit of this principle alike, that every man ought to have his own house for an asylum, where he should suffer no violence.

### C.H.A.P. XI.

How we are to judge of the difference of Laws.

N France, the punishment against false witnesfes is capital; in England it is not: Now, to be able to judge which of these two laws is the best, we must add, that in France the rack is used against criminals, but not in England; that in France the accused is not permitted to produce his witnesses; and that they very seldom admit of circumftantial evidence in favour of the prisoner: 'in England they allow of witneffeson both fides. Thefe: three French laws form a close and well connected fystem; and so do the three English laws. The law of England, which does not allow of the racking of criminals, has but very little hopes to draw from the accused a confession of his crime; for this reason it invites witnesses from all parts, and does not venture to discourage them by the fear of a capital punishment. The French law, which has one resource more, is not afraid of intimidating the witnesses; on the contrary, reason requires they should be intimidated; it listens only to the witnesses on one side \*, which are those produced by the attorney-general, and the fate of the accu-

<sup>§</sup> See the law 18. ff. de in jus vocando.

By the ancient French law, witnesses were heard on both sides.
hence we find in the institutions of St. Lewis, book 1. chap. 7. that
there was only a pecuniary punishment against false witnesses.

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fed depends folely on their testimony. But in England they admit of witnesses on both fides and the affair is diffenfied in some measure between them; confequently false witness is there less dangerous, the accused having a remedy against the falfe witness, which he has not in France .- Where fore, to determine which of those laws are most agreeable to reason, we must not consider them fingly, but compare the whole together. astgishing

### CHAP. XII

That Laws which appear the same, are sometimes really different.

THE Greek and Roman laws inflicted the fame punishment on the receiver as on the thief; the French law does the fame. The former acted rationally, but the latter does not. Among the Greeks and Romans, the thief was condemned to a pecuniary punishment, which ought also to be inflicted on the receiver: for every man that contributes in what shape soever to a damage, is obliged to repair it. But as the punishment of theft is capital with us, the receiver cannot be punished like the thief, without carrying things to excess. A receiver may act innocently on a thousand occasions; the thief is always culpable: one hinders the conviction of a crime, the other commits it; in one the whole is passive, the other is active; the thief must furmount more obstacles, and his soul must be more hardened against the laws. . . goisting interpoli all

THE civilians have gone farther; they look u-

<sup>.</sup> Leg. t. ff. dereseptateribus. aleft ni er a andreval serie get

pon the receiver as more despicable than 4 the thief; for were it not for the receiver, the thest, say they, could not be long concealed. But this again might be right when there was only a pecuniary punishment; the affair inquestion was a damage done, and the receiver was generally betterable to repair its but when the punishment became capital, they ought to have been directed by other principles.

#### CHAPAXIII.

That we must not separate the Laws from the End for which they were made; of the Roman Laws on Thest.

When he was not detected till sometimes afterwards, it was a private thesa.

THE law of the twelve tables ordained, that an epen thief should be whipt with rods, and condemned to slavery, if he had attained the age of puberty; or only whipt, if he was not of ripe age; but as for the private thief, he was only condemned to a fine of double the value of what he had stolen.

When the Porcian law abolished the custom of whipping the citizens with rods, and of reducing them to flavery, the open thief was condemned to a payment of four-fold, and they still continued to condemn the private thief to a payment of double.

I'r feems furprizing, that thefe laws should make:

Leg. 1. ff. de receptator Dus.

See what Favorinus fays in Aulus Gellins, book a.c. chap. s.

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and in the punishments they inflicted. And indeed, whether the thief was detected either before
or after he had carried the stolen goods to the place
intended, this was a circumstance which did not
alter the nature of the crime. I do not at all doubt,
but the whole theory of the Roman laws with regard to theft was borrowed from the Lacedamonian institutions. Lycurgus, with a view of rendering the citizens dexterous and cunning, ordained that children should be practifed in thieving,
and that those who were caught in the fact should
be severely whipt: this occasioned among the
Greeks, and afterwards among the Romans, a great
difference between an open and a private thest;

A wong the Romans a slave who had been quil-

A MONG the Romans a flave who had been guilty of stealing was thrown from the Tarpeian rock. Here the Lacedæmonian institutions were out of the question; the laws of Lycurgus with respect to thest were not made for slaves; to deviate from them in this respect was in reality conforming to them.

AT Rome, when a person of unripe age happened to be caught in the fact, the prætor commanded him to be whipt with rods according to his pleasure, as was practised at Sparta. All this had a more distant origin. The Lacedæmonians had derived these usages from the Cretans; and Plato, who wants to prove that the Cretan institutions were designed for war, cites the following, namely, the habit or power of bearing pain

<sup>+</sup> Compare what Plutarch fays in the life of Lyeurgus with the laws of the Digest, title de fartis; and the institutes, book a. tit. s., fect. s., a, and 3.

<sup>+</sup> Oflaws, book, si

in private combats, and in punishments inflicted for open thefts Dilla your sware through after mi he a

As the civil laws depend on the political inftitucions, because they are made for the same fociety: whenever there is a delign of udopting the civil law of another nation, it would be proper to examine before hand whether they have both the fame inflitutions, and the fame political law. and that have

Thus when the Cretan laws on theft were adonted by the Lacedemonians, as their conflitution and government were adopted at the same time. these laws were equally reasonable in both nations. But when they were carried from Lacedæmonia to Rome, as they did not find there the same constitution, they were always thought strange, and had no manner of connexion with the other civil laws of the Romans.

### him some regulation to kname assett are wish CHAP. XIV.

That we must not separate the Laws from the Circumstances in which they were made.

T was decreed by a law at Athens, that when the city was belieged, all the ufeless people should be put to death \*. This was an horridpolitical law, in consequence of an abominable law of nations. Among the Greeks the inhabitants of a towntaken, loft their civil liberty, and were fold as flaves. The taking of a town implied its intire destruction; which is the fource not only of those obstinate defences, and of those unnatural actions. but also of these shocking laws which they sometimes: enacted.

Inutilis atas cocidatur. Syrian in Hermog.

should be punished for neglect or unskilfulness.

In those cases, if the physician was a person of any

fortune or rank, he was only condemned to depor-

tation: but if he was of a low condition, he was

put to death. By our institutions it is otherwise.

The Roman laws were not made under the fame

circumstances as ours: at Rome every ignorant pre-

tender intermeddled with phylic; butamongst us,

phyficians are obliged to go through a regular course

of study, and to take their degrees; for which rea-

fon they are supposed to understand their professi-

CHAP. XV.

That sometime it is proper the Law should amend itfelf.

thief, if upon being purfued he attempted to make a defence: but it required that the person who killed the thief + should cry out and call his fel-

low-citizens; this is indeed what those laws, which

allow people to do justice to themselves, ought al-

ways to require. It is the cry of innocence, which

in the very moment of the action, calls in witnef-

fes and appeals to judges. The people ought to

+ The Cornellan law de Sicariis, Institut. lib. 4. tit. 3. de lege A.

t IbiJem, see the decree of Tassilon added to the law of the Bava-

quilia, fect. 7.

rians, de popularib. legib. art 4.

\* See the 4th law, ff. ad leg. Aquil.

THE law of the twelve tables \* allowed people to kill a night-thief as well as a day-

THE Roman laws + ordained that phylicians

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take cognizance of the action, and at the very inflant of its being done; an inflant when everything speaks, even the air, the countenance, the passions, the silence of the agent; and when every word either condemns or absolves. A law which may become so contrary to the security and liberty of the citizens, ought to be executed in their presence.

### CHAP. XVI.

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Things to be observed on the composing of Laws.

THEY who have a genius sufficient to enable them to give laws to their own, or to another nation, ought to be particularly attentive to the manner of forming them.

THE stile ought to be concise. The laws of the twelve tables are a model of conciseness; the very children \* used to learn them by heart. Justinian's Novella were so very diffused, that they were obliged to abridge them †.

THE stile should likewise be plain and simple; a direct expression being better understood than an indirect one. There is no majesty at all in the laws of the lower empire; princes are made to speak like rhetoricians. When the stile of laws is tumid, they are looked upon only as a work of parade and oftentation.

It is an essential article that the words of the laws should excite in every body the same ideas. Cardinal Richelieu, agreed, that a minister might be accused before the king; but he would have the

<sup>\*</sup> Ut carmen necessarium Cicero de legio. 2.

<sup>†</sup> It is the work of Irnerius.

Political testament.

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the leas. ight accuser punished, if the facts he proved were not matters of moment. This was enough to stop people from telling any truth whatsoever against the minister; because a matter of moment is entirely relative, and what may be of moment to one is not so to another.

THE law of Honorius punished with death any person that purchased a freed-man as a slave, or that § gave him molestation. He should not have made use of so vague an expression; the molestation given to a man, wholly depends on the degree of his sensibility.

WHEN the law would fix a fet rate upon things, it should avoid as much as possible the estimating it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. No one is ignorant of the story of that impudent + fellow at Rome, who used to give those he met a box on the ear, and afterwards tendered them the sive and twenty pence of the law of the twelve tables.

WHEN the law has once fixed the idea of things, it should never return to vague expressions. The ordinance of Lewis XIV.\* concerning criminal matters, after an exact enumeration of the cause in which the king is immediately concerned, adds these words, " and those which in all times have been subject to the determination of the king's

\* Aulus Gellius, book 20. chap. 1.

<sup>§</sup> Aut qualitet manumissione donatum inquictare voluerit. Appendix to the Theodosian code in the first volume of father Sirmond's works, p. 737.

<sup>•</sup> We find in the verbal process of this ordinance the motive: that determined him.

" judges," this renders the thing again arbitrary, after it had been fixed.

CHARLES VII. † fays, he has been informed that the parties appeal three, four, and fix months after judgment, contrary to the custom of the kingdom in the country governed by custom: he therefore ordains, that they shall appeal forthwith, unless there happens to be some fraud or deceit in the attorney §, or unless there be a great or evident cause to sue the appeal. The end of this law destroys the beginning, and it destroys it so effectually, that they used afterwards to appeal during the space of thirty years.

THE law of the Lombards 1 does not allow a woman that has taken a religious habit, though the has made no vow, to marry; because, says this law, if a spouse who has been contracted to a woman only by a ring, cannot without guilt be married to another; for a much stronger reason the spouse of God or of the blessed virgin. . . . . Now I say, that in laws the arguments should be drawn from one reality to another, and not from reality to sigure, or from sigure to reality.

A Law enacted by Constantine , ordains, that the single testimony of a bishop should be sufficient, without listening to any other witnesses. This prince took a very short method; he judged of affairs by persons, and of persons by dignities.

<sup>+</sup> In his ordinance of Montel-les-tours in the year 1453.

<sup>§</sup> They might punish the attorney, without there being any necesfity of disturbing the public order.

The ordinance of the year 1667, has made fome regulations upon this head.

<sup>1</sup> Book 2. tit. 37.

In father Sirmondus's appendix to the Theodofian code, tom. r.

THE laws ought not to be subtle; they are designed for people of common understanding, not as an art of logic, but as the plain reason of a father of a family.

WHEN there is no necessity for exceptions and limitations in a law, it is much better to omit them: details of that kind throw people into new

details.

No alteration should be made in a law without fufficient reason. Justinian ordained, that a husband might be repudiated, and yet the wife not lose her portion, if for the space of 1 two years he had been incapable of consummating the marriage. He altered his law afterwards, and allowed the poor wretch three years. But in a case of that nature, two years are as good as three, and three are not worth more than two.

WHEN a legislator condescends to give the reafon of his law, it ought to be worthy of its majesty. A Roman & law decrees, that a blind man is incapable to plead, because he cannot see the ornaments of the magistracy. So bad a reason must have been given on purpose, when such a number of good reasons were at hand.

PAUL the civilian + fays, that a child grows perfect in the feventh month, and that the proportion of Pythagoras's numbers feems to prove it. It is very odd that they should judge of those things by the proportion of Pythagoras's numbers.

Some French lawyers have afferted, that when the king made an acquisition of a new country, the

<sup>1</sup> Leg. 1, Cod. de Repudiis.

I See the Authentic Sed bodie, in the code de Repudits.

S Leg 1. ff. de postulando.

<sup>+</sup> In his Sentences, book 4. tit. 9.

churches became subject to the Regale, because the king's crown is round. I shall not examine here into the king's rights, or whether in this case the reason of the civil or ecclesiastic law ought to submit to that of the law of politics: I shall only say, that those august rights ought to be defended by grave maxims. Was there ever such athing known, as the real rights of a dignity, founded on the signer of that dignity's sign?

DAVILA i fays, that Charles IX. was declared of age in the parliament of Roan at fourteen years commenced, because the laws require every moment-of the-time to be reckoned, in cases relating to the restitution and administration of an orphan's estate: whereas it considers the year begun as an year complete, when the case is concerning the acquisition of honours. I am very far from censuring a regulation which has been hitherto attended with no inconveniency; I shall only observe, that the reason alledged † is not the trueone; it is salse, that the government of a nation is only an honour.

In point of presumption, that of the law is far preserable to that of the man. The French law considers every act of a merchant during the ten days preceding his bankruptcy as fraudulent: this is the presumption of the law. The Roman law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to it through fear of the event of a law-suit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the hus-

<sup>1</sup> Della guerra civile di Francia, pag. 96.

<sup>†</sup> The Chancellor de l'Hopital, ibid.

<sup>#</sup> It was made in the month of November, 1702.

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band's conduct, and must have determined a very obscure and ambiguous point: when the law prefumes, it gives a fixed rule to the judge.

PLATO'S law i, as I have already remarked, required that a punishment should be inflicted on the person who killed himself not with a design of avoiding shame, but through pusillanimity. This law was so far desective, that in the only case in which it was impossible to draw from the criminal an acknowledgment of the motive upon which he had acted, it required the judge to determine concerning these motives.

As useless laws debilitate such as are necessary, fo those that may be easily eluded, weaken the legislation. Every law ought to have its effect, and no one should be suffered to deviate from it by a

particular exception.

THE Falcidian law ordained among the Romans, that the heir should always have the fourth part of the inheritance: another law \* permitted the testator to prohibit the heir from retaining this fourth part. This is making a jest of the laws. The Falcidian law became useless: for if the testator had a mind to favour his heir, the latter had no need of the Falcidian law; and if he did not intend to favour him, he forbad him to make use of it.

CARE should be taken that the laws be worded in such a manner, as not to be contrary to the very nature of things. In the proscription of the prince of Orange, Philip II. promises to any man that will kill the prince, to give him, or his heirs, five and twenty thousand crowns, together with the title of

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<sup>\*</sup> It is the Authentic, fed cum testator.

nobility; and this upon the word of a king, and as a fervant of God. To promife nobility for such an action! to ordain such an action in the quality of a servant of God! This is equally subversive of the ideas of honour, morality, and religion.

THERE very feldom happens to be a necessity of prohibiting a thing which is not bad, under pre-

tence of some imaginary perfection.

THERE ought to be a certain simplicity and candour in the laws: made to punish the iniquity of men, they themselves should be clad with the robes of innocence. We find in the law of the Visigoths that soolish request, by which the Jews were obliged to eat every thing dressed with pork, provided they did not eat the pork itself. This was a very great cruelty; they were obliged to submit to a law, contrary to their own; and they were allowed to retain nothing more of their own, than what might serve as a mark to distinguish them.

#### CHAP. XVII.

A bad Method of giving Laws.

HE Roman emperors manifested their will like our princes, by decrees and edicts; but they allowed, which our princes do not, both the judges and private people to interrogate them by letters in their several differences; and their answers were called rescripts. The decretals of the popes are rescripts, strictly speaking. It is evident, that this is a bad method of legislation. Those who thus apply for laws are improper guides to the le-

<sup>4</sup> Book 12. tit. 2. § 16.

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gislator; the sacts are always wrong stated. Julius Capitolinus & Tays, that Trajan often resused to give this kind of rescripts, lest a single decision, and frequently a particular savour, should be extended to all cases. Macrinus resolved to abolish all those rescripts; he could not bear that the answers of Commodus, Caraoulla, and all those other ignorant princes, should be considered as laws. Justinian thought otherwise, and he filled his compilement with them.

I would advise those who read the Romanlaws, to distinguish carefully between this fort of hypotheses, and the Senatus-consulta, the Plebiscita, the general constitutions of the emperors, and all the laws founded on the nature of things, on the frailty of women, the weakness of minors, and the public utility.

# CHAP. XVIII.

# Of the ideas of Uniformity.

fometimes strike great geniuses, (for they even affected Charlemain) but infallibly make an impression on little souls. They discover therein a kind of perfection, because it is impossible for them not to see it; the same weights, the same measures in trade, the same laws in the state, the same religion in all its parts. But is this always right, and without exception? is the evil of changing always less than that of suffering? And does not a greatness of genius consist rather in distin-

<sup>.</sup> See Julius Capitolinus in Macrino.

L Ibid.

guishing between those cases in which uniformity is requisite, and those in which there is a necessity for difference? In China the Chinese are governed by the Chinese ceremonial: and the Tartars by theirs: And yet there is no nation in the universe, that aims so much at tranquillity. If the people observe the laws, what signifies it whether these laws are the same?

# CHAP. XIX.

Of Legislators.

RISTOTLE wanted to indulge fometimes his jealoufy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavel was full of his idol, the duke of Valentinois. Sir Thomas Moor, who spoke rather of what he had read, than of what he thought, wanted+ to govern all states with the simplicity of a Greek city. Harrington was full of the idea of his favourite republic of England, whilst a croud of writers faw nothing but confusion where monarchy is abolished. The laws always meet the passions and prejudices of the legislator; fometimes they pass through, and imbibe only a tincture; fometimes they ftop, and are incorporated with them, all add at a beit stock told substantial and married

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<sup>♦</sup> In his Utopia.

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Theory of the feudal Laws among the Franks, in the Relation they bear to the Establishment of the Monarchy.

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Of feudal Laws.

WERE I filently to pass over an event pen, I should think my work imperfect; were I not to speak of those laws which suddenly appeared over all Europe, without being connected with any of the former inftitutions; of those laws which have done infinite good and infinite mischief; which have fuffered rights to remain when the demesne has been ceded; which by vesting several with different kinds of feignory over the fame things or persons, have lessened the weight of the whole seignory; which have established different limits in empires of too great an extent; which have been productive of rule with a bias to anarchy, and of anarchy with a tendency to order and harmony.

This would require a particular work to itfelf; but confidering the nature of the present undertaking, the reader will here meet rather with a general furvey, than with a complete treatife of those laws.

THE feudal laws form a very beautiful prospect.

A venerable + oak raises its losty head to the skies; the eye at a great distance sees its spreading leaves: upon drawing nearer, it perceives the trunk, but does not discern the root; the ground must be dug up to discover it.

### CHAP. II.

# Of the Source of feudal Laws.

HE conquerors of the Boman empire came from Germany. Though few ancient authors have described their manners, yet we have two of very great weight. Cæsar making war against the Germans, describes the manners \* of that nation; and upon these he regulated \* some of his enterprises. A few pages of Cæsar upon this subject are equal to whole volumes.

TACITUS has written an entire work on the manners of the Germans. This work is short, but it comes from the pen of Tacitus, who was always concise, because he saw every thing at one glance.

THESE two authors agree fo perfectly with the codes still extant of the laws of the Barbarians, that reading Cæsar and Tacitus, we imagine we are perusing these codes, and perusing these codes, we imagine we are reading Cæsar and Tacitus.

Bur if in this refearch into the feudal laws, I should find myself entangled and lost in a dark labyrinth, I fancy I have the clue in my hand, and that I shall be able to find my way through.

<sup>#</sup> Libereas, tantum radice ad Tartara tendit. VIRGIL.

Book 6.

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# The origin of Vasfalage.

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ASAR fays, "That the Germans ne-" glected agriculture; that the most part of: "them lived upon milk, cheefe, and flesh; that no " one had lands or boundaries of his own; that: "the princes and magistrates of each nationallot-" ted what portion of land they chufed to indivi-"duals, and obliged them the year following to " remove to some other part." Tacitus says \*,.. "That each prince had a multitude of men, who "were attached to his fervice, and followed him "wherever he went.". This anthor gives them a name in his language relative to their state, which is that of companions +. They had a strong emulation to obtain the prince's esteem; and the prinees had the fame emulation to distinguish themfelves in the bravery and number of their companions. "Their dignity and power," continues : Tacitus, " confifts in being continually furround-"ed with a multitude of young and chosen people: "this they reckon their ornament in peace, this " their defence and support in war. Their name " becomes famous at home, and among neighbour-" ing nations, when they excel all others in the " number and courage of their companions: they " receive presents and embassies from all parts. Reputation frequently decides the fate of war. In

Book 6th of the Gallic wars. Tacitus adds, milli domus aut ager, aut aliqua cura ; prout ad quem venere aluntur. De Morib. Germ.

<sup>.</sup> De morib. German.

<sup>&</sup>amp; Comites. .

battle it is infamy in the prince to be furpaffed " in courage; it is infamy in the companions not " to follow the noble example of their prince; it " is an eternal difgrace to furvive him. To de-" fend him is their most facred engagement. of city be at peace, the princes go to those who are es at war; and it is thus they retain a great number of friends. To thefe they give the warhorse and the terrible javelin. Their pay conif fifts in coarse but plentiful repasts. The prince " fupports his liberality merely by war and plun-" der. You might easier persuade them to attack " an enemy and to expose themselves to the dane gers of war, than to cultivate the land, or to " attend to the cares of husbandry; they refuse to " acquire by fweat what they can purchase with " blood."

THUS, among the Germans there were vaffals, but no fiefs; they had no fiefs, because the princes had no lands to give; or rather their fiefs consisted in horses trained for war, in arms, and feasting. There were vaffals, because there wery trusty men, who being bound by their word, engaged to follow the prince to the field, and did very near the same fervice as was afterwards performed for the fiefs.

#### CHAP. IV.

Continuation of the Same Subject.

ESAR & fays, that "when any of the prin-"ces declared to the affembly that he intended to fet out upon an expedition, and afked them to follow him; those who approved the

<sup>+</sup> De Bello Gallico, lib. 6.

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" leader, and the enterprize, stood up and offered "their affistance. Upon which they were com-

" mended by the multitude. But if they did not

" fulfil their engagements, they loft the public e-

" fteem, and were looked upon as deferters and "traitors." we says West and source source I

WHAT Cæfar fays in this place, and what we have extracted in the preceding chapter from Tacitus, is the substance of the history of our princes of the first race. It bear and to has add therwood

WE must not therefore be astonished, that our kings should have new armies to raise upon every expedition, new troops to encourage, new people to engage; thatto acquire much they were obliged to incur great expences; that they should be conftant gainers by the division of lands and spoils, and yet constantly give these lands and spoils away: that their demesne should continually increase and diminish; that a father upon settling a kingdom on one of his children, should always give him a treasure with it; that the king's treasure should be confidered as necessary to the monarchy; and that one king \* could not give part of it to foreigners, even in portion with his daughter, without the confent of the other kings. The monarchy moved by fprings, which they were perpetually obliged to wind up.

\* See the life of Dogobert.

of the disself of the thouse in his composite

<sup>\*</sup> See Gregory of Tours, book 6. on the marriage of the daughter of Chilperic. Childebert fends ambassadors to tell him, that he should not give the cities of his father's kingdom to his daughter, nor his treasures, nor his bondmen, nor horses, nor horsemen, nor teams of oxen, &c. The transfer of the waiter of A. is the Villentia state and to the confidence of the state of the state

## CHAP. V.

Wheeler and the secretaries of

# Of the Conquests of the Franks.

IT is not true, that the Franks upon entering.
Gaul took possession of the whole country to turn it into siefs. Some have been of this opinion, because they saw the greatest part of the country, towards the end of the second race, converted into siefs, rear-siefs, or other dependencies; but such a disposition was owing to particular causes, which shall be afterwards explained.

The confequence which fundry writers would infer from thence, that the Barbarians made a general regulation for establishing in all parts the state of villainage, is as salse as the principle from which it is derived. If at a time when the fiels were precarious, all the lands of the kingdom had been sies or dependencies of sies, and all the men in the kingdom vasials or bondmen, subardinate to vassals; as the person that has property is always, possessed of the sies, that is, of the only property then existing, would have been as arbitrary a monarch

## € H A P. VI.

as the Grand Seignior; which is absolutely contra-

dictory to all history.

Of the Gorhs, Burgundians, and Franks.

AUL was invaded by German nations. The Vifigoths took possession of the province of Narbonne, and of almost all the south; the Bur-

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gundians settled in the east; and the Franks subdued very near all the rest.

No doubt but these Barbarians retained in their respective conquests the manners, inclinations, and customs of their own country; for no nation canchange in an instant their manner of thinking and acting. These people in Germany neglected agriculture. It seems by Cæsar and Tacitus, that they applied themselves greatly to a pastoral life: hence the regulations of the codes of Barbarian laws are almost all relating to their slocks. Roricon, who wrote a history among the Franks, was a shepherd.

#### CHAP. VII.

Different ways of dividing the Land.

A FTER the Goths and Burgundians had under various pretences penetrated into the heart of the empire, the Romans, in order to put a stop to their devastations, were obliged to provide for their subsistence. At first they allowed them a corn; but afterwards chose to give them lands. The emperors, or the Roman a magistrates in their name, made particular conventions with them concerning the division of lands, as we find in the chronicles and in the codes of the Visigoths + and Burgundians §.

The Romans obliged themselves to this by treaties.

<sup>\*</sup> Burgundiones partem Gallia occuparunt, terrasque cum Gallicis senatoribus diviserunt. Marius's Chron cle, in the year 456.

<sup>+</sup> Book x. tit, 1. fect, 8, 9, & 16.

<sup>5</sup> Chap. 54. fest. 1. & 2. This division was still subsisting in the time of Lewis the Pious, as appears by his capitulary of the year 329, which has been inferred in the law of the Busgundians, tit. 79. fest 1.

THE Franks did not follow the fame plan. In the Salic and Ripuarian laws we find not the least vestige of any such division of lands: they had subdued the country, and so took what they pleased, making no regulations but amongst themselves.

LET us therefore diftinguish between the conduct of the Burgundians and Visigoths in Gaul, of those same Visigoths in Spain, of the \* auxiliary troops under Augustulus and Odoacer in Italy, and that of the Franks in Gaul, as also of the Vandals\* in Africa. The former entered into conventions with the ancient inhabitants, and in consequence thereof made a division of lands between them; the latter did no such thing.

# CHAP. VIII.

### Gontinuation of the same Subject.

der verlens recences remarked in a the

the Roman lands were entirely usurped by the Barbarians, is their finding in the laws of the Visigoths and the Burgundians, that these two nations had two thirds of the lands: but this they took only in certain quarters or districts assigned them.

GUNDEBALD + fays in the law of the Burgundians, that his people at their establishment had two thirds of the lands allowed them; and the second supplement & to this law takes notice, that

<sup>+</sup> See Procopius war of the Goths.

<sup>\*</sup> See Procopius war of the Vandals.

<sup>+</sup> Liect co tempore quo populus noster mancipiorum tertiam & duas terrurum partes accepit, &c. Law of the Burgundians. tit. 54. sect. 3

<sup>9</sup> Ut non amplius a Burgundionibus qui infra venerunt requiratur-

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only a moiety would be allowed to those who should hereafter come to live in that country. Therefore all the lands had not been divided in the beginning between the Romans and the Burgundians.

In those two regulations we meet with the same expressions in the text; consequently they explain one another; and as the latter cannot mean an aniverfal division of lands, neither can this signification be given to the former.

THE Franks acted with the fame moderation as the Burgundians; they did not firip the Romans wherever they extended their conquests. What would they have done with fo much land? They took what fuited them, and left the remainder.

### CHAP. IX.

A just application of the Law of the Burgundians and of that of the Visigoths, with respect to the divisions of Lands.

T is to be considered that those divisions of land were not made with a tyrannical spirit; but with a view of relieving the reciprocal wants of two nations that were to inhabit the fame country.

THE law of the Burgundians ordains that a Burgundian shall be received in an hospitable manner by a Roman. This is agreeable to the manners of the Germans, who, according to Tacitus +, were the most hospitable people in the universe.

By the law of the Burgundians, it is ordained, that the Burgundians shall have two thirds of the lands, and one third of the bondmen. In this it confidered the genius of two nations, and conform-I be of it shads and we have it is at the

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fiftence. As the Burgundians dealt chiefly in cattle, they wanted a great deal of land and few bondmen; and the Romans from their application to agriculture had need of less land and of a greater number of bondmen. The woods were equally divided, because their wants in this respect were the fame.

We find in the code \* of the Burgundians, that each Barbarian was placed near a Roman. The division therefore was not general; but the Romans who gave the division, were equal in number to the Burgundians who received it. The Roman was injured the least possible. The Burgundians as a martial people, fond of hunting and of a pastoral life, did not refuse to accept of the fallow grounds; while the Romans kept such lands as were properest for culture: the Burgundian's flock fattened the Roman's field.

#### CHAP. X.

### Of Servitudes.

THE law of the Burgundians \* takes notice, that when those people settled in Gaul, they were allowed two thirds of the land, and one third of the bondmen. The state of villainage was therefore † established in that part of Gaul before it was invaded by the Burgundians.

THE law of the Burgundians in points respecting

<sup>\*</sup> And in that of the Viligoths.

<sup>#</sup> Tit . 54.

<sup>†</sup> This is confirmed by the whole title of the code de Agricolis & Censitis, & Colonis.

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both, between the nobles, the free-born, and the bondmen. Servitude was not therefore a thing particular to the Romans; nor liberty and nobility particular to the Barbarians.

This very same law says , that if a Burgundian freedman had not given a particular sum to his master, nor received a third share of a Roman, he was always supposed to belong to his master's family. The Roman proprietor was therefore free, since he did not belong to another person's family; he was free, because his third portion was a mark of liberty.

WE need only open the Salic and Ripuarian daws, to be fatisfied that the Romans were no more in a fate of flavery among the Franks, than among the

other conquerors of Gault.

THE count de Boulainvilliers is mistaken in the capital point of his system: he has not proved that the Franks made a general segulation to reduce the Romans into a kind of servitude.

As this author's work is penned without art, and as he speaks with the simplicity, freeness, and candour of that ancient nobility from whence he descends, every one is capable of judging of the sine things he says, and of the errors into which he is fallen. I shall not therefore undertake to criticise him; I shall only observe, that he had more wit than sense, more sense than knowledge; though his knowledge was not contemptible, for he was well,

Pater stressess ices.

<sup>§</sup> Si dentem optimati Burgundioni vel Romano nobili excusserit. tit. 26. sect. 1. & si mediocribus personis ingenuis tam Burgundionibus quam Romanis. 1bid, sect. 2.

<sup>+</sup> Tit. 59. 1 mays, at tank our saffert middian our M

racquainted with the most valuable part of our history and laws.

THE count de Boulainvillers, and the abbe du Bos, have formed two different systems, one of which feems to be a conspiracy against the commons, and the other against the nobility. When the sun gave leave to Phæton to drive his chariot, he said to him, "If you ascend too high, you will burn the hea-" venly mansions; if you descend too low, you will "reduce the earth to ashes: Do not drive to the "right, you will meet there with the constellation of the serpent; avoid going too much to the left, "you will there sall in with that of the altar: keep in the middle \*."

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# Continuation of the same Subject.

HAT first gave rise to the notion of a general regulation made at the time of the conquest, is our meeting with an infinite number of servitudes in France towards the beginning of the third race; and as the continual progression of these fervitudes was not attended to, people imagined in an age of obscurity a general law which was never framed.

Towards the beginning of the first race, we meet with a prodigious number of freemen, both among the Franks and the Romans; but the num-

\* Nec preme, nec summum molire per athera currum;
Altius egressus, coelestia testa cremahis;
Inferius terras: medio tutissimus ihis.
Neu te dexterior tortum declinet ad anguem,
Neve sinisterior pressam rota ducat ad aram;
Inter utrumque tene;
Ovid. Metam. lib. ü.

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ber of bondmen augmented to that degree, that at the commencement of the third race, all the husbandmen and almost all the inhabitants † of towns were become bondmen: and whereas at the first period there was very near the same administration in the cities as among the Romans, namely, a corporation, a senate, and courts of judicature; at the other we hardly meet with any thing but a lord and his bondmen.

When the Franks, Burgundians, and Goths, made their several invasions, they seized upon gold, silver, moveables, clothes, men, women, boys, and whatever the army could carry; the whole was brought to one place, and divided amongst the army . History shews, that after the first settlement, that is after the first devastations, they entered into an agreement with the inhabitants, and left them all their political and civil rights. This was the law of nations in those days; they plundered every thing in time of war, and granted every thing in time of peace. Were it not so, how should we find both in the Salic and Burgundian laws such a number of regulations absolutely contrary to a general servitude of the people?

But though the conquest was not immediately productive of servitude, it arose nevertheless from the same law of nations \* which subsisted after the conquest. Opposition, revolts, and the taking of towns, were followed by the slavery of the inhabi-

<sup>+</sup> While Gaul was under the dominion of the Romans, they formed particular bodies; these were generally freedmen, or the descendants of freedmen.

<sup>+</sup> See Gregory of Tours, book ii. chap. 27. Aimoin, book i.

<sup>.</sup> See the lives of the Saints in the next page.

tants. And, not to mention the wars which the conquering nations made against one another, as there was this particularity among the Franks, that the different partitions of the monarchy perpetually gave rise to civil wars between brothers or nephews, in which this law of nations was constantly practised, servitudes of course became more general in France than in other countries: and this is, I believe, one of the causes of the difference between our French laws and those of Italy and Spain, with regard to the right of seignories.

THE conquest was soon over; and the law of nations then in sorce was productive of some service dependencies. The custom of the same law of nations, which obtained for many ages, gave a prodigious extent to those servitudes.

THEODORIC imagining that the people of Auvergne were not faithful to him, thus addressed the Franks of his division: "Follow me, and I will carry you into a country where you shall have gold, silver, captives, clothes, and slocks in abundance; and you shall remove all the people into your own country."

AFTER the conclusion of the peace \* between Gontram and Chilperic, the troops employed in the fiege of Bourges having had orders to return, carried such a considerable booty away with them, that they hardly lest either men or cattle in the country.

THEODORIC, king of Italy, whose spirit and policy it was ever to distinguish himself from the other barbarian kings, upon sending an army into Gaul, wrote thus to the general \*: " It is my will

<sup>♣</sup> Lives of the Saints, book vi. chap, 3 ..

<sup>\*</sup> Letter 43, lib. iii. in Caffied.

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"that the Roman laws be followed, and that you reflore the fugitive flaves to their right owners, "The defender of liberty ought not to encourage fervants to defert their masters. Let other kings delight in the plunder and devastation of the towns which they have conquered; we are desirous to subdue in such a manner, that our subjects shall lament their having fallen too late under our government." It is obvious, that his intention was to cast an odium on the kings of the Franks and the Burgundians, and that he alluded in the above passage to their particular law of na-

YET this law of nations continued in force under the fecond race. King Pepin's army, having penetrated into Aquitaine, returned to France loaded with an immense booty, and with a prodigious number of bondmen, as we are informed by the annals of Metz.

HERE might I quote numberless \* authorities: and as the public compassion was raised at the fight of those miseries, as several holy prelates beholding the captives in chains, employed the treasure belonging to the church, and sold even the sacred utensils, to ransom as many as they could; and as several holy monks exerted themselves on that occasion, it is in the † lives of the saintsthat we meet

<sup>♦</sup> In the year 763. Innumerabilibus spoliis & captivis totus ille ex-

<sup>\*</sup> See the annals of Fuld, in the year 739, Paulus Diacomus, de gestis Longobardorum, lib. iii, c. 30. & lib. iv. c. 1, and the lives of the faints in the next quotation.

<sup>†</sup> See the lives of S. Epiphanius, S. Eptadius. S. Cæfarius, S. Fidolus, S. Porcian, S. Treverius, S. Eusichius, and of S. Leger, the misscles of S, Julian, &c,

with the best eclair issuements on this subject. And, although it may be objected to the authors of those lives, that they have been sometimes a little too credulous with regard to things which God has certainly performed, if they were in the order of his providence; yet we draw considerable lights from thence, with respect to the manners and customs of those times.

WHEN we cast an eye upon the monuments of our history and laws, the whole seems to be an immense expanse, or a boundless ocean: all those frigid, dry, crude writings must be devoured in the same manner, as Saturn is sabled to have devoured the stones.

A PRODIGIOUS quantity of land which had been in the hands of freemen \*, was changed into mortmain, when the country was stripped of its free inhabitants; those who had a great multitude of bondmen either tock large territories by force, or had them yielded by agreement, and built villages, as may be seen in different charters. On the other hand, the freemen who cultivated the arts, found themselves reduced to exercise those arts in a state of servitude: thus the servitudes restored to the arts and to agriculture whatever they had lost.

IT was a customary thing with the proprietors of land, to give them to the churches, in order to hold them themselves by a quit rent, thinking to partake by their servitude of the sanctity of the churches.

Deerant quoque littora ponto. Ovid. line 1

Even the husb ndmen themselves were not all slaves: see the 18th and 13d law in the code at Agriculis, & Consis, & Colonis, and the 20th of the same title.

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### CHAP. XII.

That the Lands belonging to the division of the Barbarians paid no Taxes.

People remarkable for their simplicity and poverty, a free and martial people, who lived without any other industry than that of tending their flocks, and who had nothing but rush cottages to attach them to their + lands; such a people, I say, must have followed their chiefs for the sake of booty, and not to pay or to raise taxes. The art of tax-gathering is generally invented too late, and when men begin to enjoy the selicity of other arts.

THE transient \* tax of a pitcher of wine for every acre, which was one of the exactions of Chilperic and Fredegonda, related only to the Romans. And indeed it was not the Franks that tore the rolls of those taxes, but the clergy, who at that time were all Romans. The burthen of this tax lay chiefly on the inhabitants \* of the towns; now these were almost all inhabited by Romans.

GREGORY of Tours † relates, that a certain judge was obliged after the death of Chilperic to take refuge in a church, for having under the reign of that prince ordered taxes to be levied on feveral Franks, who in the reign of Childebert were ingenui, or free-born: Multos de Francis, qui tempore Childe-

<sup>+</sup> See Gregory of Tours, book ii.

<sup>#</sup> Ibid. book v.

Qua conditio universis urbibus per Galliam constitutis summopere est adbibita. Life of S. Aridius.

<sup>+</sup> Book vii.

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berti regis ingenui fuerant, publico tributo subegit. Therefore the Franks who were not bondmen paid no taxes.

THERE is not a grammarian, but would be ashamed to see how the Abbe du Bos & has interpreted this passage. He observes, that in thosedays the
freedmen were likewise called ingenui. Upon this
supposition he renders the Latin word ingenui, by
freed from taxes; a phrase, which we indeed may
use as freed from cares, freed from punishments; but
in the Latin tongue, such expressions as ingenui a
tributis, libertini a tributis, manumissi tributorum,
would be quite monstrous.

PARTHENIUS, Tays Gregory of Tours ¶, had like to have been put to death by the Franks for subjecting them to taxes. The Abbe du Bos sinding himself hard pressed by this passage ♠, very coolly supposes the thing in question: it was, he says, an extraordinary duty.

We find in the law of the Visigoths\*, that when a Barbarian had seized upon the estate of a Roman, the judge obliged him to sell it, in order that this estate might continue to be tributary; consequently the Barbarians paid no taxes †.

THE Abbe du Bos & who, to support his fystem,

<sup>§</sup> Establishment of the French monarchy, tom. iii. chap. 14. pag.

<sup>¶</sup> Book Hi, c. 436.

<sup>4</sup> Tom.iii. p. 514.

<sup>\*</sup> Judices atque prapositi tertias Romanorum, ab illis qui occupatas tement, auferant, & Romanis sua exactione sine aliqua dilatione restituant, ut nibil sisso debeat deperire, lib.x. tit. 1. cap. 14.

<sup>4</sup> The Vandels paid none in Africa. Procopius war of the Vandels, lib. 1 and 2. Historia Miscella, lib. 26. p. 106. Observe that the conquerors of Africa were a mixture of Vandels, Alans, and Franks. Historia Miscella, lib. 24. p. 94.

<sup>&</sup>amp; Ellablishment of the Franks in Gaul. tom. fli, chap. 14. pag. 510.

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would fain have the Vifigoths subject to taxes T. quits the literal and spiritual fense of the law, and pretends upon no other indeed than an imaginary foundation, that between the establishment of the Goths and this law there had been an augmentation of taxes which related only to the Remans. But none but father Harduin are permitted thus to exercise an arbitrary power over facts.

This learned author + has rummaged Justinian's code-, in fearch of laws, to prove that among the Romans the military benefices were fubject to taxes. From whence he would infer that the fame held good with respect to fiels or benefices among the Franks. But the opinion that our fiefs derive their origin from that institution of the Romans. is at prefent exploded; it obtained only at a time when the Roman hiftory, but not ours, was well understood, and our ancient records lay buried in ob-

Bur the Abbe is in the wrong to quote Caffiodorus, and to make use of what was transacting in Italy and in the part of Gaul subject to Theodoric, in order to acquaint us with the practice established among the Franks; these are things which must not be confounded. I intend to shew, some time or other, in a particular work, that the plan of the monarchy of the Oftrogoths was quite different from that of any other government founded in those days by the other Barbarian nations; and

I. He lays a stress upon another law of the Visigoths, book x, tit. 1. art. 11. which proves nothing at all; it fays only, that he who has received of a lord a piece of land on condition of a rent or fervice, ought to pay it,

<sup>#</sup> Book iii. p. 511.

<sup>-</sup> Lege iii. tit. 74. lib. xi.

fo far are we intitled to affirm that a practice obtained among the Franks, because it was established among the Ostrogoths, that on the contrary we have just reason to think that a custom of the Ostrogoths was not in sorce among the Franks.

THE hardest task for persons of extensive erudition, is to deduce their arguments from passages not foreign to the subject, and to find, if we may be allowed to express ourselves in astronomical terms, the true place of the sun.

THE same author makes a wrong use of the capitularies, as well as of the historians and laws of the barbarous nations. When he wants the Franks to pay taxes, he applies to freemen what can be understood only of \* bondmen; when he speaks of their military service, heapplies to \* bondmen what can never relate but to freemen.

#### CHAP. XIII.

Of Taxes paid by the Romans and Gauls, in the monarchy of the Franks.

I Might here examine whether after the Gauls and Romans were conquered, they continued to pay the taxes to which they were subject under the emperors. But, for shortness sake, I shall be content with observing, that if they paid them in the beginning, they were soon after exempted, and that those taxes were changed into a military service. For I confess I cannot conceive how the

<sup>♣</sup> Establishment of the French monarchy, tom. iii. chap. 14. pag. 513. where he quotes the 28th article of the edict of Pistes. Sectarther on.

<sup>#</sup> Ibid. tom. iii. chap. 4. pag. 298.

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Franks should have been at first such great friends, and afterwards such sudden and violent enemies, to taxes.

A CAPITULARY \* of Lewis the Pious explains the fituation of the freemen in the monarchy of the Franks vastly well. Some troops \* of Goths or Iberians, slying from the oppression of the Moors, were received into Lewis's dominions. The agreement made with them was, that, like other freemen, they should follow their count to the army; and that upon a march they should mount guard † and patrol under the command also of their count; and that they should furnish horses and carriages for baggage to the king's § commissaries and to the ambassadors in their way to and from court; and that they should not be compelled to pay any farther acknowledgment, but should be treated like; the other freemen.

In cannot be faid that these were new usages introduced towards the beginning of the second race. This must be referred at least to the middle or to the end of the sits. A capitulary of the year a 864, says in express terms, that it was the ancient custom for freemen to perform military service, and also to surnish the horses and carriages abovementioned; duties particular to themselves, and

<sup>→</sup> In the year 815, chap. 1. which is agreeable to the capitulary of Charles the Bald, in the year 844, art. 1, & 2.

<sup>•</sup> Pro Hispanis in partibus Aquitania, Septimania, & Provincia confistentibus. 11-id.

<sup>+</sup> Excubias & explorationes quas Wactas dicunt. Ibid.

<sup>§</sup> They were not obliged to furnish any to the count. Ibid. art. 5;

<sup>\*</sup> Ut Pagenses Franci, qui caballos habent, cum suis comitibus in horsem pergant. The counts are forbid to deprive them of their horses, ut hostem facere, & debitos paraveredos secundum antiquam consuctudinem exsolvere possint. Edict of Pistes in Baluzius, p. 186.

from which those who possessed the siefs were ex-

This is not all; there was a regulation \* which hardly allowed the imposing of taxes on those freemen. He who had four manors § was always obliged to march against the enemy: he who had but three, was joined with a freeman that had only one; the latter bore the fourth part of the other's charges, and staid at home. In like manner, they joined two freemen who had each two manors; he who went to the army had half his charges bore by him who staid at home.

AGAIN, we have a prodigious number of charters, in which the privileges of fiefs are granted to lands or districts possessed by freemen, and of which I shall make farther mention hereaster . These lands are exempted from all the duties or services, which were required of them by the counts, and by the rest of the king's officers: and as all these services are particularly enumerated, without making any mention of taxes, it is manifest that no taxes were imposed upon them.

IT was very natural that the Roman art of taxgathering should fall of itself in the monarchy of the Franks: it was a most complicate art, far above the conception, and wide from the plan, of those simple people. Were the Tartars to over-run Europe, we should find it very difficult to make them comprehend what is meant by our financiers.

<sup>•</sup> Capitulary of Charlemain, in the year 812. chap. 1. Edict of Pistes in the year 864. art. 27.

<sup>§</sup> Quature mansos. I fancy that what they called Mansus was a particular portion of land belonging to a farm where there were bondmen; witness the capitulary of the year 853, apud Sylvacum, tit. ziv. against those who drove the bondmen from their Mansus.

<sup>+</sup> Sec above, ch. xx. of this book.

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dv. THE \* anonymous author of the life of Lewis the Pious, speaking of the counts and other officers of the nation of the Franks, whom Charlemain established in Aquitania, says, that he intrusted them with the care of defending the frontiers, as also with the military power and the direction of the demesnes belonging to the crown. This shews the state of the royal revenues under the second race. The prince had kept his demesnes in his own hands, and employed his bondmen in improving them. But the indictions, the capitations, and other taxes raised at the time of the emperors on the perfons or goods of freemen, bad been changed into an obligation of defending the frontiers, and marching against the enemy.

In the same history +, we find that Lewis the Pious having been to wait upon his father in Germany, this prince asked him, why he, who was a crowned head, came to be so poor: to which Lewis replied, that he was only a nominal king, and that the great lords were possessed of almost all his demesses; that Charlemain, searing lest this young prince should forfeit their affection, if he attempted himself to resume what he had inconsiderately granted, appointed commissaries to restore things to their

former fituation.

THE bishops writing to Liewis, brother to Charles the Bald, use these words: "Take care of "your lands, that you may not be obliged to travel continually by the houses of the clergy, and to tire their bondmen with carriages. Manage your affairs, continue they, in such a manner, that you

In Duchefne, tom. a. p. 287.

<sup>†</sup> Ibid. p. 80.

See the capitulary of the year 858. art. 14.

"may have enough to live upon, and to receive "embassies." It is obvious, that the king's revenues \* in those days consisted of their demesses.

#### CHAP. XIV.

Of what they called Cenfus.

A FTER the Barbarians had quitted their own country, they were desirous of reducing their usages into writing; but as they found a difficulty in writing German words with Roman letters,

they published these laws in Latin.

In the confusion and rapidity of the conquest, most things changed their nature: in order however to express them, they were obliged to make use of such old Latin words, as were most analogous to the new usages. Thus whatever was likely to revive the idea of the ancient census of the Romans, they called by the name of census, tributum; and when things had no relation at all to the Roman census, they expressed, as well as they could, the German words by Roman letters: thus they formed the word fredum, on which I shall have occasion to descant in the following chapters.

THE words cenfus and tributum having been employed in an arbitrary manner, this has thrown

\* They levied also some duties on rivers, where there happened to

be a bridge or a passage.

The census was so generical a word, that they made use of it to express the tolks of rivers, when there was a bridge or serry to pass. See the third espitulary, in the year 803. edition of Baluzius, pag. 305: art. 1. & the 5th in the year 819. pag. 616. They gave likewise this name to the carriages surnished by the freemen to the king, or to his commissaries, as appears by the capitulary of Charles the Bald; in the year 895, art. 8.

fome obscurity on the signification in which these words were used under our princes of the first and fecond race. And modern \* authors who have a dopted particular fystems, having found these words. in the writings of those days, thought that what was then called cenfus, was exactly the cenfus of the Romans; and from thence they inferred this. consequence, that our kings of the two first races had put themselves in the place of the Roman emperors, and made no change in 6their administration. Besides, as particular duties raised under the: fecond race were by chance and by certain + reftrictions converted into others, they inferred from thence that these duties were the census of the Romans: and, as fince the modern regulations, they found that the crown demefnes were absolutely unalienable, they pretended that those duties which represented the Roman census, and did not form a part of the demefnes, were mere usurpation. I.o-mit the other consequences.

To apply the ideas of the present time to distant ages, is a fource of error. To those people who want to modernize all the ancient ages, I shall fay? what the Egyptian priests said to Solon, O Athernians, you are mere children!

The Abbe du Bos, and his followers:

See the weakness of the arguments produced by the Abbe du's Bos, in the establishment of the French monarchy, tom. iii, book 6. chap. 14. especially in the inference he draws from a passage of Gregory of Tours, concerning a dispute between his church and king Charibert.

<sup>+</sup> For example, by infranchisements.

#### CHAP. XV.

That what they called census was raised only on the bondmen, and not on the freemen.

THE king, the clergy, and the lords raised regular taxes, each on the bondmen of their respective demesnes. I prove it with regard to the king, by the capitulary de Villis; with respect to the clergy, by the codes of the laws of the Barbarians; and with relation to the lords, by the regulations which Charlemain made concerning this subject.

THESE taxes were called cenfus; they were coconomical and not fiscal duties, mere private fervices, and not public obligations.

I AFFIRM, that what they called eenfus at that time, was a tax raised upon the bondmen. This I prove by a formulary of Marculfus, containing a permission from the king to enter into holy orders, provided the person be & free-born, and not enrolled in the register of the census. I likewise prove it by a commission from Charlemain to a count, whom he had sent into Saxony; which contains the infranchisement of the Saxons for having embraced Christianity, and is properly a charter of freedom. This prince restores them to their for-

Law of the Alemans, chap. 22, and the law of the Bavarians, it. 1. chap. 14. where the regulations are to be found which the clergy made concerning their order.

Book 5th of the Capitularies, chap. 303.

<sup>§</sup> Si ille de capite suo bene ingenuus sit, et in Pulctico publico censitus non est. lib. 1. formul. 19.

<sup>\*</sup> In the year 789 edition of the Capitularies by Baluzius, vol. i. pag. 250.

<sup>+</sup> Et ut ifloingenuitatis pagina firmo flabilifque confiftat. Ibid.

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mer & civil liberty, and exempts them from paying the census. It was therefore the same thing to be a bondman, as to pay the census, to be free as not to pay it.

By a kind of letters patent ¶ of the same prince in savour of the Spaniards, who had been received into the monarchy, the counts are forbid to demand any census of them, or to deprive them of their lands. Every one knows, that strangers upon their coming to France were treated as bondmen; and Charlemain being desirous they should be considered as freemen, since he would have them be proprietors of their lands, forbad the demanding any census of them.

A CAPITULARY of Charles the Bald --, given in favour of those very Spaniards, orders them to be treated like the other Franks, and forbids the requiring any census of them: consequently this census was not paid by freemen.

THE thirtieth article of the edict of Piffes reforms the abuse, by which several of the husbandmen belonging to the king or to the church, sold the lands dependent on their manors to ecclesiastics or to people of their condition, reserving only a small cottage to themselves; by which means they avoided paying the census; and, it ordains, that thingsshould be restored to their primitive situation; the gensus was therefore a tax peculiar to bondmen.

FROM thence it likewise follows, that there was no general census in the monarchy; and this is

S Pristinaque libertati donatos, & amni nobis debito censu salutos. Ibid.

Praceptum pro Hispanis, in the year 824. edition of Baluzius. tom. i. pag. 500.

Pag. 1.7.

clear from a great number of passages. For what could be the meaning of this + capitulary? We ordain that the royal census shall be levied in all places, where formerly it was \* lawfully levied. What could be the meaning of that in which + Charlemain orders his commissaries in the provinces to make an exact enquiry into all the census's that belonged in former times & to the king's demesne? And of that \* in which he disposes of the census's paid by those f of whom they are demanded? What can that other capitulary -- mean, in which we read, If any perfor + has acquired a tributary land, on which we were accustomed to levy the census? And that other, in fine \*, in which Charles the Bald + makes mention of the lands, whose census had from time immemorial belonged to the king.

OBSERVE that there are some passages which feem at first sight to be contrary to what I have said, and yet confirm it. We have already seen that the freemen in the monarchy were obliged on-

· Undecunque legitime exigebatur. 1bid.

Third capitulary of the year 805. art. 20 & 23. inferted in the collection of Anzegife, book iii. art. 15. This is agreeable to that of Charles the Bald, in the year 854. apud Attiniacum, art. 6.

<sup>†</sup> In the year 812. art. 10. & 11. edition of Baluzins, tom, i.

<sup>§</sup> Undecunque artiquitus ad partem regis venire solebant. Capitulary of the year 812, art. 10, & 11.

In the year 813. art. 6. edition of Baluzius, tom, i. pag. 508.

The illis unde censa exigunt. Capitulary of the year 813. art. 6.

Book iv. of the Capitularies, art. 37. and inferted in the law of the Lombards.

Si quis terram tributariam, unde ad partem nostram exire folebat, susceperit. Book iv. of the Capitularies, art. 37.

<sup>#</sup> In the year 805. art. 8.

<sup>+</sup> Unde census ad partem regis exivit antiquitus. Capitulary of the year 805. art. 8.

CHAP. XV.

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ly to furnish particular carriages; the capitulary just now cited gives to this \* the name of cenfus, and opposes it to the census paid by the bondmen.

Besides, the edict \* of Pistes takes notice of those freemen who were obliged to pay the royal census for their † head and for their cottages, and who had fold themselves during the samine. The king orders them to be ransomed. This is § because those who were manumitted by the king's letters, did not, generally speaking, acquire a full and perfect ¶ liberty, but they paid censum in capite; and these are the people here meant.

WE must therefore explode the idea of a general and universal census, in imitation of that of the Romans, from which census the rights of the lords are likewise supposed to have been derived by usurpation. What was called census in the French monarchy, independently of the abuse made of that word, was a particular tax imposed on the bondmen by their masters.

I BEG the reader to excuse the trouble I must give him with such a number of citations. I should be more concise, did I not meet with the Abbe du Bos's book on the establishment of the French mo-

Censibus vel paraveredis quos Franci bomines ad regiam potestatem exsolvere debent.

<sup>\*</sup> In the year 864. art. 34. edition of Baluzius, p. 192.

<sup>+</sup> De illis francis hominibus qui censum regium de suo capite & de suis resellis debeant. Ibid.

<sup>§</sup> The a8th article of the same edict explains this extremely well; it even makes a distinction between a Roman freedman and a Frank freedman: And we likewise see there that the census was not general; it deserves to be read.

<sup>¶</sup> As appears by a capitulary of Charlemain in the year 8:3, which has been already quoted,

narchy in Gaul, continually in my way. Nothing is a greater obstacle to our progress in knowledge, than a bad performance of a celebrated author; because, before we instruct, we must begin with undeceiving.

## CHAP. XVI.

## Of the feudal Lords or Vasfals.

Have taken notice of those volunteers among the Germans, who followed their princes in their several expeditions. The same custom continued after the conquest. Tacitus mentions them by the name of companions \*; the Salic law by that of men who have vowed fealty \* to the king; the formularies of † Marculfus by that of the king's Antrustrio's §, the earliest French historians by that of Leudes ¶, faithful and loyal; and those of later date by that of vassals of and lords.

In the Salie and Ripuarian laws we meet with a prodigious number of regulations in regard to the Franks, and only with a few for the Antrustio's. The regulations concerning the Antrustio's are different from those which were made for the other Franks; they are full of what relates to the settling of the property of the Franks, but mention not a word concerning that of the Antrustio's. This is because the property of the latter was regulated ra-

<sup>·</sup> Comites.

<sup>·</sup> Qui funt in trufte regis, tit. 44. art. 4.

<sup>+</sup> Book i, formul, 18.

<sup>§</sup> From the word trew, which fignifies faithful, among the Germans.

<sup>1</sup> Leudes, fideles.

<sup>-</sup>o- Voffalii feniores.

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ther by the political than by the civil law, and was the share that fell to an army, and not the patrimony of a family.

THE goods referved for the feudal lords were called fiscal \* goods, benefices, honours, and fiefs, by different authors and in different times.

THERE is not the least doubt but the fiefs at first were at will \*. We find in Gregory of Tours +. that Sunegifilus and Gallomanus were deprived of all they held of the exchequer, and no more was left them than their real property. When Gontram raifed his nephew Childebert to the throne, he had a private conference with him, in which he named & the persons who ought to be honoured with, and those who ought to be deprived of, the fiefs. In a formulary ¶ of Marculfus, the king gives in exchange not only the benefices held by his exchequer, but also those which had been held by another. The law of the Lombards oppofes the benefices to property. In this our historians, the formularies, the codes of the different barbarous nations, and all the monuments of those days, are unanimous. In short, the writers of the book of fiefs inform us, that at first the lords could take

<sup>\*</sup> Fiscalia. See the 14th formulary of Marculfus, book i. It is mentioned in the life of S. Maur, dedit fiscum unum. and in the annals of Metz, in the year 747, dedit ilti comitatus & fiscos plurimos. The goods designed for the support of the royal family were called regalia.

<sup>\*</sup> See the Ist book. tit. I. of the fiefs; and Cujas on that book.

<sup>+</sup> Book oth, chap. 38.

<sup>§</sup> Quos honoraret muneribus, quos ab honore depellerat. Ibid. lib. vii.

Vel reliquis quibuscumque beneficiis, quodeumque ille, vel fiscus noster in ipsis locis tenuisse noscitur. Lib. 2. formul. 30.

<sup>---</sup> Liv iii. tit. 8. fect. 3.

Antiquissimo enim tempore sie erat in Dominorum potestate connexum, ut quando vellent possent auferre rem in feudum a se datam: posten

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them back when they pleafed, that afterwards they granted them for the space of a year \*, and that at length they gave them for life.

#### CHAP. XVII.

## Of the military Service of Freemen.

TWO forts of people were bound to military fervice; the great and leffer vaffals, who were obliged in consequence of their fief; and the free-men, whether Franks, Romans, or Gauls, who served under the count, and were commanded by him and his officers.

THE name of freemen was given to those, who on the one hand had no benefices or fiefs, and on the other were not subject to the base services of willainage; the lands they possessed were what they called allodial estates.

THE counts + assembled the freemen, and led them against the enemy; they had officers under them who were called § vicars; and as all the freemen were divided into hundreds, which constituted what they called a borough, the counts had likewise officers under them, who were denominated

vero conventum est ut per annum tantum sirmitatem baberent, deinde statum est ut usque ad vitam sidelis produceretur. Fuedorum, lib. i. tit. s.

<sup>\*</sup> It was a kind of precarious tenure which the lord confented or refused to renew every year; as Cujas has observed.

<sup>+</sup> See the capitulary of Charlemain in the year 8-2. art. 3 & 4. edition of Baluzius, tom. i. p. 491. and the edict of Piftes in the year 864, art. 26. tom. i. p. 186.

<sup>§</sup> Et habebat unusquisque comes Vicarios & Centenerios secum. Book ii. of the capitularies, art. 28.

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centenarii, and led the freemen of the borough, or their hundreds, to the field.

This division into hundreds is posterior to the establishment of the Franks in Gaul. It was made by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in their division; this we find in the decrees \* of those princes. A regulation of this kind is to this very day observed in England.

As the counts led the freemen against the enemy, the feudal lords commanded likewise their vafsals or rear-vassals; and the bishops, abbots, or their †

advocates also commanded theirs 6.

THE bishops were greatly embarrassed, and inconsistent with themselves; they requested of Charlemain not to oblige them any longer to a military service; and when he granted their request, they complained that he had deprived them of the public esteem; so that this prince was obliged to justify his intentions upon this head. Be that as it may, when they were exempted from marching against the enemy, I do not find that their vassals were led by the counts; on the contrary, we see that the kings or the bishops chose one of their seudatories to conduct them.

They were called Compagenfes.

+ Advocati.

Published in the year 595. art. r. See the capitularies, edition of Baluzius, pag. 20. These regulations were undoubtedly made by agreement.

<sup>§</sup> Capitulary of Charlemain, in the year 812. art. 1. & 5. edition of Baluzius, tom. 1. pag. 490.

of Baluzius, pag. 408. & 410.

Gapitulary of Worms in the year 803. edition of Baluzius, pag. 409. and the council in the year 845, under Charles the Bald, in vere no palatio, edition of Baluzius, tom. ii. pag. 17. art. 8.

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In a capitulary of Lewisthe Pious, this prince distinguishes three kinds of vassals, those belonging to the king, those to the bishops, and those to the counts. The vassals of a feudal lord were not led against the enemy by the count, unless some employment in the king's houshold prevented the lord himself from commanding them.

But who is it that led the feudal lords into the field? No doubt the king himfelf, who was always at the head of his faithful vaffals. Hence we always find in the capitularies a diffinction made \*between the king's vaffals and those of the bishops. Such brave and magnanimous princes as our kings, did not take the field to put themselves at the head of an ecclesiastic militia; these were not the men they chose to conquer or die with.

But these lords carried their vassals and rearvassals with them; as we can prove by the capitulary +, in which Charlemain ordains that every freeman, who has four manors either in his own property, or as a benefice from somebody else, should march against the enemy, or follow his lord. It is

<sup>--</sup> The 5th Capitulary of the year 819. art. 27. edition of Baluzius, pag. 618.

De Vassis Dominicis qui adhuc intra casam serviunt & tamen beneficia babere noscuntur, statutum est ut quicumque ex eis cum Domino Imperatore domi remanserint, vassallos suos casatos secum non retineant; sed cum comite, cujus pagenses sunt. ire permittant. ad capitulary in the year 812. art. 7. edition of Baluzius, tom. i. pag. 494.

<sup>\* 1</sup> Capitul. of the year 812. art. 5. de bominibus nostris, & episcoporum & abbatum qui vel benesicia vel talia propria habent, &c. edition of Baluzius, tom. i. pag. 490.

<sup>+</sup> In the year \$12. chap. 1. edition of Baluzius, pag. 490. ut omuis homo liber quatuor mansos vestitos de proprio suo, sive de alicujus beuesicio habet, ipse se praparet, & ipse in hostem pergat, sive cum seniore suo.

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obvious, that Charlemain means, that the person who had a manor of his own should march under the count, and he who held a benefice of a lord, should set out along with him.

AND yet the Abbedu Bos pretends, that when mention is made in the capitularies, of tenants who depended on a particular lord, no others are meant than bondmen; and he grounds his opinion on the law of the Vifigoths, and the practice of that nation. It is much better to rely on the capitularies themselves; that which I have just quoted, says expressly the contrary. The treaty between Charles the Bald and his brothers, likewise takes notice of freemen, who might chuse to follow either a lord or the king; and this regulation is conformable to a great many others.

WE may therefore conclude, that there were three kinds of military services; that of the king's vassals, who had no other vassals under them; that of the bishops or of the other clergy, and their vassals, and, in short, that of the count, who commanded the freemen.

Nor but the valials might be likewise subject to the count; as those who have a particular command are subordinate to him, who is invested with a more general authority.

WE even find that the count and the king's commiffaries might oblige them to pay the fine, when they had not fulfilled the engagements of their fief. In like manner if the king's vaffals to the committed any outrage, they were subject to the

<sup>4</sup> Tom, iii. book 6. chap. 4. p. 299. establishment of the French monarchy.

<sup>\*</sup> Capitulary of the year 882, art. 12. apud vernum palatium, edition of Baluzius, tom. ii, pag. 289.

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## CHAP. XVIII.

Of the double Service.

T was a fundamental principle of the monarchy, that whofoever was fubject to the military power of another person, was likewise subject to his civil jurisdiction. Thus the capitulary of Lewis the Pious in the year 815, makes the military power of the count, and his civil-jurisdiction over the freemen, keep always an equal pace. Thus the placita \* of the count who carried the freemen against the enemy, were + called the placita of the freemen; from whence undoubtedly came this maxim, that the questions relating to liberty could be decided only in the count's placita, and not in those of his officers. Thus the count never led the vaffals & belonging to the bishops or to the abbots against the enemy, because they were not subject to this civil jurisdiction. Thus he never commanded the rear-vaffal sbelonging to the king's vaffals. Thus the gloffary - of the English laws informs us, that those to whom "o" the Saxons gave the name

Art. 1, 2, and the council in verno palatio of the year 845. art. 8, edition of Baluzius, tom. ii, pag. 17.

<sup>\*</sup> Or affizes.

<sup>†</sup> Capitularies, book 4th of the collection of Anzegife, art. 57 and the 5th capitulary of Lewis the Pious in the year 819, art. 14. edition of Baluzius, tom. i. p. 615.

See the 8th note of the preceding chapter.

<sup>-</sup> It is to be found in the collection of William Lambard, de pri-

<sup>-</sup>e In the word Satrapia.

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of Coples, were by the Normans called counts, or companions, because they shared the judiciary fines with the king. Thus we see, that at all times the duty of a vassal a towards his lord, was to bear arms †, and to try his peers in his court.

ONE of the reasons which produced this connexion between the judiciary right and that of leading the forces against the enemy, was because the person who led them exacted at the same time the payment of the fiscal duties, which consisted in some carriage services due by the freemen, and in general in certain judiciary profits, which shall be hereaster treated of.

THE lords had the right of administering justice in their sief, by the same principle as the counts had it in their counties. And indeed, the counties in the several variations that happened at different times, always followed the variations of the siefs; both were governed on the same plan, and by the same principle. In a word, the counts in their counties were lords, and the lords in their seignories were counts.

It has been a mistake to consider the counts as civil officers, and the dukes as military commanders. Both were equally civil and military officers: the whole difference consisted in the duke's having several counts under him, though there were

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<sup>4</sup> This is well explained by the affizes of Jerusalem, chap, 221 & 222.

<sup>†</sup> The advowees of the church (advocati) were equally at the head of their placits, and of their militia.

<sup>+</sup> See the 8th formulary of Marculfus, book i. which contains the letters given to a duke, parrician, or count; and invests them with the civil jurisdiction, and the fiscal administration.

counts who had no duke over them, as we learn from Fredegarius +.

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PERHAPS it will be imagined that the government of the Franks must have been very severe at that time, since the same officers were invested with a military and civil power, nay, even with a fiscal authority, over the subjects; which in the preceding books I have observed to be distinguishing marks of despotism.

But we must not believe that the counts pronounced judgment by themselves, and administered justice in the same manner as the bashaws in Turky; in order to judge affairs, they affembled a kind of affizes, where the principal men appeared.

In order that we may thoroughly understand what relates to the judicial proceedings, in the formula's, in the laws of the barbarians, and in the capitularies, it is proper to observe that the functions of the count, of the Grasso or siscal judge, and the Gentenarius, were the same; that the judges, the Rathimburghers, and the sherists, were the same persons under different names. These were the count's assistants, and were generally seven in number; and as he was obliged to have twelve persons to judge , he filled up the number with the principal men\*.

Bur whoever had the jurisdiction, the king, the count, the Grofio, the Centenarius, the lords, or the clergy, they never tried causes alone; and this

<sup>+</sup> Chronicle, chap. 78. in the year 636.

<sup>◆</sup> See concerning this subject the capitularies of Lewis the Pious, added to the Salic law, art. 2. and the formula of judgments given by Du Cange in the word boni homines.

<sup>\*</sup> Per bonos bomines, fometimes there were none but principal men.
See the appendix to the formularies of Marculfus, ch. 51.

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of Germany, was still continued even after the fiefs had assumed a new form.

WITH respect to the fiscal power, its nature was such, that the count could hardly abuse it. The rights of the prince with regard to the freemen, were so simple, that they consisted only, as has been already observed, in certain carriages which were demanded of them on some public occasions. And as for the judiciary rights, there were laws which prevented \* misdemeanors.

#### CHAP. XIX.

Of Compositions among the barbarous Nations.

SINCE it is impossible to have any tolerable notion of our political law, unless we are thoroughly acquainted with the laws and manners of the German nations, I shall therefore pause here a little, in order to inquire into those manners and laws.

It appears by Tacitus, that the Germans knew only two capital crimes; they hanged traitors, and drowned cowards; these werethe only public crimes among those people. When a man + had injured another, the relations of the person injured took share in the quarrel, and the offence was cancelled

And some tolls on rivers, of which I have spoke already.

<sup>\*</sup> See the law of the Ripuarians, tit. 89. and the law of the Lombards, book ii. tit, 52. fest. 9.

<sup>+</sup> Sussipere tam inimicitias, seu patris seu propinqui, quam animicitias necesse est: nec implacabiles durant; luitur enim etiam bomicidium certo armentorum ac pecorum numero, recipitque satisfactionem universa domus. Tacit, de morib. Germ.

by a fatisfaction. This fatisfaction was made to the perion offended when capable of receiving it; or to the relations if they had been injured in common, or if by the decease of the party injured, the satisfaction had devolved to them.

In the manner mentioned by Tacitus, these satisfactions were made by the mutual agreement of the parties; hence in the codes of the barbarous nations these satisfactions are called compositions.

THE law of the Frisians is the only one I find that has left the people in that situation, in which every family at variance was in some measure in the state of nature, and in which being unrestrained either by a political or civil law, they might give a loose to their revenge, till they had obtained satisfaction. Even this law was moderated; a regulation was made \*, that the person whose life was sought after, should be unmolested in his own house, as also in going and coming from church, and from the court where causes were tried.

THE compilers of the Salic laws cite † an ancient custom of the Franks, by which a person who had dug a corpse out of the ground in order to strip it, should be banished from society, till the relations had consented to his being readmitted. And as before that time strict orders were issued to every one, even to the offender's own wise, not to give him a morsel of bread, or to receive him under their roof; such a person was in respect to others, and others in respect to him, in a state of nature, till an end was put to this state by a composition.

See this law in the ad title on murders; and Vulemar's addition on robberies.

Additio fapientum, tit. i. fect. t.

<sup>+</sup> Saliclaw, tit. lviii, fcet, 1. tit. xvii, fect. 3.

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This excepted, we find that the fages of the different barbarous nations thought of determining by themselves, what would have been too long and too dangerous to expect from the mutual agreement of the parties. They took care to fix the value of the composition which the party injured was to receive. All those barbarian laws are in this respect most admirably exact; the several cases are minutely a distinguished, the circumstances are weighed, the law substitutes itself in the place of the person injured, and insists upon the same satissaction as he himself would have demanded in cold blood.

By the establishing of those laws, the German nations quitted that state of nature, in which they seem to have lived in Tacitus's time.

ROTHARIS declares in the law of \* the Lombards, that he had increased the compositions anciently accustomed for wounds, in order that the wounded person being fully satisfied, all enmities should cease. And indeed, as the Lombards, from a very poor people, were grown rich by the conquest of Italy, the ancient compositions were become frivolous, and reconcilements prevented. It do not doubt but this was the motive which obliged the other chiefs of the conquering nations to make the different codes of laws now extant.

THE principal composition was that which the murderer paid to the relations of the deceased. The

<sup>4</sup> The Salie laws are admirable in this respect; see especially the titles 2, 3, 4, 5, 6, and 7, which related to the stealing of cattle.

<sup>\*</sup> Book i, tit. 7. fect. 15.

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difference of † conditions produced a difference in ahe compositions: Thus in the law of the Angli, there was a composition of six hundred sous for the murder of an adeling, two hundred for that of a freeman, and thirty for killing a bondman. The largeness therefore of the composition for the life of a man, was one of his chief privileges; for beside the distinction it made of his person, it also cstablished a greater security in his favour among rude and boisterous nations.

This we are made fensible of by the law of the Bavarians: it gives the names of the Bavarian families who received a double composition, because they were the first \* after the Agilolsings. The Agilolsings were of the ducal race, and it was customary with this nation to chuse a duke out of that family; these had a quadruple composition. The composition for a duke exceeded by a third, that which had been established for the Agilolsings: because he is a duke, says the law, a greater honour is paid to him than to his relations.

But as those people, especially when they lived in Germany, had very-little specie, they might pay it in cattle, corn, moveables, arms, dogs, hawks †, lands, &c. The law itself § often determined the

I Scethe law of the Angli, tit. i. fect. 1. 2. & 4. ibid. tit. v. fect. 6. the law of the Bavarians, tit. i. chap. 8. & 9. and the law of the Frifians, tit. xv.

<sup>4</sup> Tit. ii. chap. 20.

<sup>\*</sup> Hocidra, Ozza, Sagana, Habilingua, Anniena. Ibid.

<sup>†</sup> Thus the law of Ina valued life by a certain sum of money, or by a certain portion of land. Leges Ina regis, titulo de villico regio de priscis Anglorum legibus. Cambridge 1644.

<sup>§</sup> See the law of the Saxons, which makes this same regulation for several people, chap. 18. See also the law of the Ripuarians, tit. 35. seet. 11. the law of the Bavarians, tit. 1. sect. 10. & 11. Si surum non babet, donet aliam pecuniam, mancipia, terram, &c.

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value of those things; which explains how it was possible for them to have such a number of pecuniary punishments with so very little money.

THESE laws were therefore employed in exactly determining the difference of wrongs, injuries, and crimes; in order that every one might know how far he had been injured or offended, the reparation he was to receive, and especially that he was to receive no more.

In this light it is easy to conceive, that a perfon who had taken revenge after having received fatisfaction, was guilty of an heinous crime. This contained a public as well as a private offence: it was a contempt of the law of itself; a crime which the legislators \* never failed to punish.

THERE was another crime, which above all others was confidered as dangerous, when \* those people lost something of their spirit of independence, and when the kings endeavoured to establish a better civil administration: this was the refusing to give or to receive satisfaction. We find in the different codes of the laws of the Barbarians, that the legislators were peremptory † on this article. In

See the law of the Lombards, book i. tit. 25. fect. 22. ibid. book i. tit. 9. fect. 8. & 34. ibid. fect 38. and the capitulary of Charlemain in the year 802. chap. 32. containing an instruction given to those whom he sent into the provinces.

<sup>\*</sup> See in Gregory of Tours, book vii. chap 47. the detail of a procefs, wherein a party lofes half the composition that had been adjudged to him, for having done justice to himself, instead of receiving fatisfaction, whatever injury he migh: have afterwards received.

<sup>†</sup> See the law of the Saxons, chap. 3. and 4. the law of the Lombards, book i. tit. 37. fect. 1. & 2. and the law of the Alemans, tit. 45. fect. 1 & 2. This last law gave leave to the party injured to right himself upon the spot, and in the first transport of passion. See

effect, a person who refused to receive satisfaction, wanted to preserve his right of prosecution; he who resused to give it, lest the right of prosecution to the person injured; and this is what the sages had resormed in the institutions of the Germans, whereby people were invited but not compelled to compositions.

I JUST now mentioned a text of the Salic law, in which the legislator left the party offended at liberty to receive or to refuse satisfaction; it is the law by which a person who had stripped a dead body, was expelled from society, till the relations upon receiving satisfaction petitioned for his being readmitted. It was owing to the respect they had for sacred things, that the compilers of the Salic laws did not meddle with the ancient usage.

a composition to the relations of a robber killed in the fact, or to the relations of a woman who had been repudiated for the crime of adultery. The law \* of the Bavarians allowed no composition in the like cases, but punished the relations who sought revenge.

It is no rare thing to meet with compositions for involuntary actions in the codes of the laws of the Barbarians. The law of the Lombards is generally very prudent; it † ordained, that in those cases the composition should be according to the

The compilers of the law of the Ripuarians feem to have foftened this. See the 85th title of those laws.

+ Book i. tit, ix, fect. 4.

also the capitularies of Charlemain in the year 779, chap, 22, in the year 802, chap, 32, and also that of the year 805, chap, 5.

See the decree of Taffillon, de popularibus legibus, art. 3. 4, 10.

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person's generosity; and that the relations should no longer be allowed to pursue their revenge.

CLOTHARIUS II. made a very wife decree: he forbad & the person robbed to receive any clandestine composition, and without an order from the judge. We shall presently see the motive of this law.

#### CHAP. XX.

Of what was afterwards called the Jurisdiction of the Lords.

BESIDE the composition which they were obliged to pay the relations for murders, or injuries, they were likewise under a necessity of paying a certain duty, which the codes of the barbarian laws call • fredum. We have no term in our modern language to express it; yet I intend to treat of it at large; and in order to give an idea of it, I begin with defining it a recompense for the protection granted against the right of prosecution. Even to this day, fred, in the Swedish language, signifies peace.

THE administration of justice among those rude and unpolished nations, was nothing more than granting to the person who had committed an ofsence, a protection against the prosecution of the party offended, and obliging the latter to accept of

<sup>§</sup> Pactus pro tenore pacis inter Childebertum & Clotarium, anno-593. & decretio Clotarii a. regis circa annum 595, chap. 22.

When it was not determined by the law, it was generally the third of what was given for the composition, as appears in the law of the Ripuarians, chap. 89. which is explained by the third capitulary of the year 813. Edition of Baluzius, tom. i. pag. \$134

the fatisfaction due to him: infomuch, that among the Germans, contrary to the practice of all other nations, justice was administered in order to protect the criminal against the party injured.

THE codes of the Barbarian laws have given us the cases in which the freda might be demanded. When the relations could not profecute, they allow of no fredum; and indeed, when there was no profecution, there could be no composition for a protection against it. Thus, in the law of the \* Lombards, if a person happened to kill a freeman by chance, he paid the value of the man killed, without the fredum; because as he had killed him involuntarily, it was not the cafe in which the relations were allowed the right of profecution. Thus in the law of the † Ripuarians, when a person was killed with a piece of wood, or with any instrument made by man, the instrument or the wood were deemed culpable, and the relations feized upon them for their own use, but were not permitted to demand the fredum.

In like manner, when a beaft happened to kill a man, the fame law established a composition without the fredum, because the relations of the deceased were not offended.

In short, it was ordained by the " Salic law, that a child who had committed a fault before the age of twelve, should pay the composition without the fredum: as he was not yet able to bear arms, he could not be in the case in which the party injur-

<sup>\*</sup> Book i. tit. 9. fect. 17. edition of Lindenbrock.

<sup>+</sup> Tit. 70.

Consider that a four become their Tit. 46, See alfo the law of the Lombards, book i, chap. 21. feet. 3. Lindenbrock's edition, fi caballus cum pede, &c.

<sup>-</sup> Tit. 28. fed. 6.

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It was the criminal that paid the fredum for the peace and security, of which he had been deprived by his crime, and which he might recover by protection. But a child did not lose this security; he was not a man; and of course could not be expelled from human society.

This fredum was a local right in favour of the person who was budge of the district. Yet the law of the Ripuarians beforbad him to demand it himself: it ordained, that the party who had gained the cause should receive it and carry it to the exchequer, in order that there might be a lasting peace, says the law, among the Ripuarians.

THE greatness of the fredum was proportioned to the degree of \* protection: thus the fredum for the king's protection was greater than what was granted for the protection of the court, or of the

other judges.

HERE I fee the origin of the jurisdiction of the lords. The fiefs comprized very large territories, as appears from an infinite number of records. I have already proved that the kings raised no taxes on the lands belonging to the division of the Franks; much less could they reserve to themselves any duties on the fiefs. Those who obtained them,

+ Tit. 85.

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fredus tamen judici in cujus pago est reservetur.

<sup>\*</sup> Capitulare incerti anni, chap. 57. in Baluzius, tom i. pag. 515. and 'tis to be observed, that what was called fredum or freda, in the monuments of the first race, is known by the name of bannum in those of the second race, as appears from the capitulary de partibus Saxona. in the year 789.

had in this respect a full and perfect enjoyment, reaping every possible emolument from them. And as one of the most considerable + emoluments was the judiciary profits (freda), which were received according to the custom of the Franks, it followed from thence, that the person seized of the sief, was likewise seized of the jurisdiction, the exercise of which consisted of the compositions made to the relations, and of the profits accruing to the lord; it was nothing more than ordering the payment of the composition of the law, and demanding the legal fines.

WE find by the formularies containing confirmation of the perpetuity of a fief in favour of a feudal lord, or the privileges of fiefs in favour of churches, that the fiefs were possessed of this right. This likewise appears from a vast number of charters mentioning a prohibition to the king's judges or officers of entering upon the territory in order to exercise any act of judicature whatsoever, or to demand any judiciary emolument. When the king's judges could no longer make any demand in a district, they never entered it; and those to whom this district was lest, performed the same functions as had been exercised before by the judges.

THE king's judges are forbidden also to oblige the parties to give security for their appearing be-

<sup>&#</sup>x27;+ See the capitulary of Charlemain, de villis, where he ranks thefe freda among the great revenues of what was called villa, or the king's demenses.

See the 3d, 8th, and 17th, formula, book i. of Marcuffus.

<sup>--</sup> See the 2d, 3d, and 4th formula of Marculfus, book i.

Il See the collections of those charters, especially that at the end of the 5th volume of the historians of France, published by the Benedictin monks.

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fore them: it belonged therefore to the person who had received the territory in sief, to demand this security. They mention also, that the king's commissaries shall not insist upon being accommodated with a lodging; in sine, they no longer exercised any function in those districts.

THE administration therefore of justice, both in the old and new siefs, was a right inherent in the very sief itself, a lucrative right which constituted a part of it. For this reason it has been considered at all times in this light; from whence this maxim arose, that jurisdictions are patrimonial in France.

Some have thought that the jurisdictions derived their origin from the manumissions made by the kings and lords, in favour of their bondmen. But the German nations, and those descended from them, are not the only people who manumitted their bondmen, and yet they are the only people that established patrimonial jurisdictions. Besides, we find by the formularies of Marculfus that there were freemen dependent on these jurisdictions in the earliest times: the bondmen were therefore subject to the jurisdiction, because they were upon the territory; and they did not give rise to the fiess for having been annexed to the fies.

OTHERS have taken a shorter cut: the lords, fay they, and this is all they say, usurped the jurisdiction. But are the nations descended from Germany the only people in the universe that u-

See the 3d, 4th, and 14th of the first book, and the charter of Charlemain, in the year 771, in Martenne, tom. i. Anecdot, collect. 11. pracipientes jubemus at ullus judex publicus . . . . bomines ipsius ecclesia et monosterii ipsius Morbacensis tam ingenuos quam et servos, et qui super eorum terras manere, &c.

furped the rights of princes? We are fufficiently informed by history, that several other nations have encroached upon their sovereigns; and yet we find no other instance of what we call the jurif-diction of the lords. The origin of it is therefore to be traced in the usages and customs of the Germans.

WHOEVER has the curiofity to look into Loyfeau ¶ will be aftonished at the manner in which this author supposes the lords to have proceeded, in order to form and usurp their different jurisdictions. They must have been the most artful people in the world; they must have robbed and plundered, not after the manner of a military nation, but as the country justices and attornies rob one another. Those brave warriors must be faid to have formed a general system of politics throughout all the provinces of the kingdom, and in so many other countries in Europe: Loyseau makes them reason as he himself reasoned in his closet.

ONCE more: if the jurisdiction was not a dependance of the fief, how come we every where \* to find, that the service of the fief was to attend the king or the lord both in their courts and in the army?

#### C H A P. XXI.

Of the territorial Jurisdiction of the Churches.

THE churches acquired a very confiderable property. We find that our kings gave them great seigniories, that is, great sies; and we

Treatife of village jurisdictions.

<sup>\*</sup> See Monf. du Cange on the word hominium.

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find jurisdictions established at thesame time in the demefnes of those churches. From whence could fo extraordinary a privilege derive its origin? It. must certainly have been in the nature of the grant, the church land had this privilege, because it had not been taken from it. A feigniory was given to the church; and it was allowed to enjoy the fame privileges, as if it had been granted to a vaffal. It was likewife subjected to the same service as it would have paid to the state if it had been given to a layman, according to what has been already observed.

THE churches had therefore the right of demanding the payment of compositions in their territory; and of infifting upon the fredum; and as those rights necessarily implied that of hindering the king's officers from entering upon the territory, to demand these freda and to exercise acts of judicature, the right which ecclefiaftics had of administering juflice in their own territory, was called immunity, in the style of the formularies + of the charters, and of the capitularies.

THE law of the Ripuarians & forbids the freedmen of the churches, to hold the affembly for administ aing justice in any other place than in the church where they were manumitted. The churches had therefore jurisdictions even over freemen, and held their placita in the earliest times of the monarchy.

<sup>+</sup> See the 3d and 4th formulary of Marculfus, book i,-

<sup>\*</sup> Ne alibi nisi ad ecclesiam, ubi relaxati funt, mallum teneans, tit...; 8. fect. r. See also sect. 19. Lindenbrock's edition.

<sup>--</sup> Tabulariis.

Mallum.

I FIND in the lives of the faints §, that Clovis gave to a certain holy person a power over a district of fix leagues, and exempted it from all manner of jurisdiction. This, I imagine, is a falsity, but it is a falsity of a very ancient date; both the truth and the siction contained in that life are relative to the customs and laws of those times, and 'tis these customs † and laws we are investigating.

CLOTHARIUS II. Torders the bishops or the nobility who are possessed of estates in distant parts, to chuse upon the very spot those who are to administer justice, or to receive the judiciary emoluments.

THE same prince \* regulates the judiciary power between the ecclesiastic courts and his officers. The capitulary of Charlemain in the year 802 prescribes to the bishops and abbots the qualifications necessary for their officers of justice. Another capitulary || of the same prince inhibits the royal officers, to exercise any jurisdiction over - those who are employed in manuring church lands, except they entered into that state by fraud, and to exempt themselves from contributing to the public charges. The bishops assembled at Rheims made

<sup>5</sup> Vita S. Germeri Episcopi Tolofani apud Bollandianos, 16 Maii.

<sup>+</sup> See also the life of S. Malanius, and that of Deicola.

Y In the conneil of Paris, in the year 615. Episcopi vel potentes, qui in aliis possident regionibus, judices vel missos discussores de aliis provinciis non instituant, nisi de loco qui justitiam precipiant & aliis reddant. art, 19. See also the 12th art.

<sup>\*</sup> Life of S. Melanius, and that of S. Deicola, art. 5.

<sup>||</sup> In the law of the Lombards, book ii. tit. 44. chap. 2. Linden-brock's edition.

<sup>-</sup> Servi Aldiones, libellarii antiqui, vel alii noviter facti. Art, 12th.

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a declaration, \* that the vassals belonging to the respective churches are within their immunity. The
capitulary of Charlemain in the year \$06 \* ordains that the churches should have both criminal
and civil jurisdiction over those who live upon their
lands. In effect, as the capitulary of Charles the
Bald distinguishes between the king's jurisdiction,
that of the lords, and that of the church; I shall
say nothing farther \* upon this subject.

#### CHAP. XXII.

That the Jurisdictions were established before the end of the second race.

It has been pretended that the vaffals usurped the jurisdiction in their seigniories, during the consusion of the second race. Those who chuse rather to form a general proposition than to examine it, sound it easier to say that the vassals did not possess, than to discover how they came to possess. But the jurisdictions do not owe their origin to usurpations; they are derived from the primitive establishment, and not from its corruption.

♦ Letter in the year 858. art. 7. in the capitularies, p. 108. Sicut illa res et facultates, in quibus viount clerici, ita et illa fub confecratione immunitatis funt, de quibus debent militari vassalli.

It is added to the law of the Bavarians, art. 7. See also the 3d art. Lindenbrock's edition, pag. 444. Imprimis omnium jubendam est ut babeant ecclesia earum justitias, & in vita illorum qui babitant in ipsis ecclesiis & post, tam in pecuniis quam et in substantiis earum.

- In the year 857. in fynodo apud Carifiatum, art. 9. edition of Baluzius, pag. 96.

\* See the letter written by the bishops assembled at Rheims in the year 858. art. 7. in the capitularies, Baluzius's edition, pag. 108. Sicut illa res & facultates in quibus vivunt clerici, ita et illa sub consecratione immunitatis sunt de quibus debent militare vassalli, &c.

"He who kills a freeman, fays \* the law of the Bavarians, shall pay a composition to his relations, if he has any; if not, he shall pay it to the duke, or to the person under whose protection he had put himself in his life time." 'Tis well known what it was to put one's self under the protection of another for a benefice.

"HE who has been robbed of his bondman, 
fays the law of the Alemans , shall have recourse to the prince to whom the robber is subject; in order that he may obtain the compofition.

"IF a centenarius, says the decree of Childebert, finds a robber in another hundred than his
own, or in the limits of our faithful vassals, and
does not drive him out, he shall be answerable
for the robber, or purge himself by oath." There
was therefore a difference between the district of the
centenarii and that of the vassals.

This decree ¶ of Childebert explains the constitution of Clotharius in the same year, which being given for the same case and sact, differs only in the terms; the constitution calling in truste, what by the decree is stilled in terminis sidelium nostrorum.

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<sup>\*</sup> Tit. iii. chap. 13. Lindenbrock's edition.

<sup>4</sup> Tit. 85.

ries by Baluzius, pag. 19. Pari conditione convenit ut si una centena in alia centena vestigium secuta suerit et invenerit, vel in quibuscunque sidelium nostrorum terminis vestigium miserit, & ipsum in aliam centenam minime expellere potuerit, aut convictus reddat latronem, &c.

<sup>4</sup> Si vestigius comprobatur latronis, tamen prasentia nibil longe mulctando; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quid si in truste invenitur, medietatem compositionis trustis adquirat, & capitale exigat a latrone, art. 2 & 3.

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Messieurs Bignon and Ducange , who pretend that in truste signified another king's demesne, are mistaken in their conjecture.

PEPIN, king of Italy, in a conflictution + that had been made as well for the Franks as for the Lombards, after imposing penalties on the counts and other royal officers for prevarications or delays in the administration of justice, ordains of that if it happen that a Frank or a Lombard possessed of a fief is unwilling to administer justice, the judge to whose district he belongs, shall suspend the exercise of his fief, and in the interim, either the judge or his commissary shall administer justice.

IT appears by a capitulary \* of Charlemain, that the kings did not levy the freda in all places. Another ¶ capitulary of the fame prince shews the feudal laws and feudal court to have been already established. Another of Lewis the Pious ordains, that when a person possessed of a fief, does not administer justice §, or prevents it from being administered, the king's commissaries shall live upon him at discretion, till justice be administered. I

A See the Gloffary on the word truffis.

<sup>+</sup> Inferted in the law of the Lombards, book ii. tit. 52. feet. 14. it is the capitulary of the year 793. in Baluzius, pag. 544. art. 10.

<sup>---</sup> Et si forsitan Francus aut Longobardus habens benessium justitiam facere noluerit, ille judex in cujus ministerio fuerit, contradicat illi benessium suum, interim dum ipse aut missus ejus justitiam faciat. See also the same law of the Lombards, book ii. tit. 32. sect. 2. which relates to the eapitulary of Charlemain of the year 779. art 21.

<sup>\*</sup> The third of the year 8: 2. art. 21.

The fecond of the year 813. Baluzius's edition.

<sup>§</sup> Capitulare quintum anni 819 art. 90. Baluzius's edition, pag. 617. Ut ubicumque missi, aut episcopum, aut abbatem, aut alium quem. libet bonore praditum invenerint, qui justitiam sacere noluit vel probibuit, de ipsius rebus vivant quamdiu in co loco justitias sacere debent.

shall likewise quote two \* capitularies of Charles the Bald, one of the year 861; where we find the particular jurisdictions established, with judges and subordinate officers; and the other of the year 864, where he makes a distinction between his own seigniories and those of private persons.

We have not the original grants of these siefs, because they were established by the partition, which is known to have been made among the conquerors. It cannot therefore be proved by original contracts, that the jurisdictions were at first annexed to the fiess: but if in the formularies of the confirmations, or of the translations of those fiess in perpetuity, we find, as already hath been observed, that the jurisdiction was there established; this judiciary right must certainly have been inherent in the fies, and one of its chief privileges.

We have a far greater number of records, that establish the patrimonial jurisdiction of the clergy in their districts, than there are to prove that of the benefices or fies of the seudal lords; for which two reasons may be assigned. The first, that most of the records now extant are preserved or collected by the monks, for the use of their monasteries. The second, that the patrimony of the several churches having been formed by particular grants, and by a kind of exception to the order established, they were obliged to have charters granted to

<sup>♣</sup> Edicum in Caristaco in Baluzius, tom. ii. pag. 152. unusquisque advocatus pro omnibus de sua advocatione . . . in convenientia ut cum ministerialibus de sua advocatione quos invenerit contra bunc bannum no-strum secisse . . . castiget.

Edicum Pistense, art. 18. Baluzius's edition, tom ii. pag. 181, Si in siscum nostrum vel in quamcunque immunitatem aut alicujus potentis potestatem vel proprietatum consugerit, &cc,

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them; whereas the concessions made to the seudal lords being consequences of the political order, they had no occasion to demand, and much less to preserve, a particular charter. Nay, the kings were frequently satisfied with making a simple delivery with the scepter, as appears from the life of St. Maur.

Bur the third formulary † of Marculfus sufficiently proves, that the privilege of immunity, and of course that of jurisdiction, were common to the clergy and the laity, since it is made for both. The same may be said of the constitution of Clotharius II. \*.

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General idea of Abbe Du Bos's book on the effective blifbment of the French monarchy in Gant.

Before I conclude this book, it will not be improper to write a few strictures on the Abbedu Bos's performance, because my notions are always contrary to his; and if he has his on the truth, I must have missed it.

This performance has imposed upon a great many, because it is penned with art; because the point in question is constantly supposed; because the more it is deficient in proofs, the more it abounds in probabilities; and, in short, because an infinite number of conjectures are laid down as

<sup>+</sup> Lib. 1. Maximum regui nostri augere credimus monimentum, si benesicia opportuna locis ecclesiarum aut cui valueris dicere, benevola deliberatione concedimus.

<sup>\*</sup> I have already quoted it in the preceding chapter, Episcopi vel-

principles, and from thence other conjectures are inferred as consequences. The reader forgets he has been doubting, in order to begin to believe. And as a prodigious fund of erudition is interspersed, not in the system, but around it, the mind is taken up with the appendages, and neglects the principal. Besides, such an infinite multitude of researches hardly permit one to imagine that nothing has been found; the length of the way makes us think that we are arrived at our journey's end.

But when we examine the matter thoroughly, we find an immense colossus with earthen seet; and it is the earthen seet that render the colossus immense. If the Abbe du Bos's system had been well grounded, he would not have been obliged to write three tedious volumes to prove it; he would have found every thing within his subject; and without wandering on every side in quest of what was very foreign to it, even reason itself would have undertaken to range this in the same chain with the other truths. Our history and laws would have told him; "Do not take so much trouble, we shall be your vouchers."

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Continuation of the same Subject. Reflection on the main part of the System.

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THE Abbe du Bos endeavours by all means to explode the opinion that the Franks made the conquest of Gaul. According to his system our kings were invited by the people, and only substituted themselves in the place, and succeeded to the rights of the Roman emperors.

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This pretension cannot be applied to the time when Clovis, upon his entering Gaul, took and pillaged the towns; neither is it affacable to the period when he defeated Syagring the Roman commander, and fubdued the country which he held; it can therefore be referred only to the period when Clovis, already mafter of a great part of Gaul by open force, was called by the choice and affection of the people to the fovereignty over the rest. And is it not enough that Clovis was received, he must have been called; the Abbe du Bos must prove that the people chose rather to live under Clovis, than under the domination of the Romans, or under their own laws. The Romans belonging to that part of Gaul not yet invaded by the Barbarians, were, according to this author, of two forts; the first were of the Armorican confederacy, who had driven away the emperor's officers, in order to defend themselves against the Barbarians, and to be governed by their own laws; the second were subject to the Roman officers. Now does the Abbe produce any convincing proofs that the Romans who were still subject to the empire, called in Clouis? not one. Does he prove that the republic of the Armoricans invited Clovis; or even concluded any treaty with him? not at all. So far from being able to tell us the fate of this republic, he cannot even fo much as prove its existence; and notwithstanding he pretends to trace it from the time of Honorius to the conquest of Clovis, notwithstanding he relates with a most admirable exactness all the events of those times; Rill this republic remains invisible in ancient authors. For there is a wide difference between proving by

a passage of Zozymus +, that under the emperor Honorius, the + country of Armorica and the other provinces of Gaul revolted and formed a kind of a republic; and thewing us that notwithstanding the different pacifications of Gaul, the Armoricans formed a particular republic, which continued till the conquest of Clovis: and yet this is what he should have demonstrated by strong and substantial proofs, in order to establish his system. For when we behold a victorious prince entering a country, and fubduing a great part of it by force and open violence, and foon after we find the whole country conquered, without any mention in history of the manner of its being effected, we have fufficient reason to believe that the affair ended as it began.

WHEN we find he has mistaken this point, it is easy to perceive that his whole system falls to the ground; and as often as he infers a consequence from these principles, that Gaul was not subdued by the Franks, but that the Franks were invited by the Romans, we may fafely deny it.

This author proves his principle, by the Roman dignities with which Clovis was invested: he infifts that Clovis succeeded to Chilperic his father in the office of magister malitie. But these two offices are merely of his own creation. S. Regimus's letter to Clovis, on which he grounds his opinion \*, is only a congratulation upon his accession to the crown. When the intent of writing is so well known, why should we give it another turn?

CLOVIS, towards the end of his reign, was made

<sup>+</sup> Hift. lib, vi.

<sup>+</sup> Totusque trastus Armoricus alieque Galliarum provincie. Ibid.

<sup>\*</sup> Tom. ii, book 3. chap. 18. pag, 270.

conful by the emperor Anastasius: but what right could he receive from an authority that lasted only one year? It is very probable, fays our author, that in the same diploma the emperor Anastasius made Clovis proconful. And, I fay, it is very probable he did not. With respect to a fact for which there is no foundation, the authority of him who denies is equal to that of him who affirms. But I have also a reason for denying it. Gregory of Tours, who mentions the confulate, favs never a word concerning the proconfulate. And even this proconfulate could have lafted only about fix months. Clovis died a year and a half after he was created conful; and we cannot pretend to make the proconfulate an hereditary office. In short, when the consulate, and, if you will, the proconsulate were conferred upon him, he was already mafter of the monarchy, and all his rights were established.

THE fecond proof alledged by the Abbe du Bos, is the renunciation made by the emperor Justinian, in favour of the children and grand-children of Clovis, of all the rights of the empire over Gaul. I could fay a great deal concerning this renunciation. We may judge of the regard shewn to it by the kings of the Franks, from the manner in which they performed the conditions of it. Besides, the kings of the Franks were masters, and peaceable fovereigns of Gaul; Justinian had not one foot of ground in that country; the western empire had been destroyed a long time before; and the eastern empire had no right to Gaul, but as representing the emperor of the west. These were rights to rights; the monarchy of the Franks was already founded; the regulation of their establishment was made; the reciprocal rights of the persons and of

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the different nations who lived in the monarchy, were agreed on; the laws of each nation were given and even reduced into writing. What could therefore that foreign renunciation avail to a government already established?

WHAT can the Abbe mean by making fuch a parade of the declamations of all those bishops, who amidft the confusion, and total subversion of the state, endeavour to flatter the conqueror? What else is implied by flattering, but the weakness of him who is obliged to flatter? What does rhetoric and poetry prove, but the use of those very arts? Is it possible to help being aftonished at Gregory of Tours, who after mentioning the affaffinations committed by Clovis, fays, that God laid his enemies every day at his feet, because he walked in his ways? Who doubts but the clergy were glad of Clovis's conversion, and that they even reaped great advantages from it? But who doubts at the fame time that the people experienced all the miseries of conquest, and that the Roman government submitted to that of the Franks? The Franks were neither willing nor able to make a total change; and few conquerors were always feized with fo great a degree of madness. But to render all the Abbe du Bos's consequences true, they must not only have made no change amongst the Romans, but they must have even changed themselves,

I COULD undertake to prove, by following this author's method, that the Greeks never conquered Persia. I should begin with mentioning the treaties which some of their cities concluded with the Persians: I should mention the Greeks who were in Persian pay, as the Franks were in the pay of the Romans. And if Alexander entered the Per-

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fian territories, befieged, took, and destroyed the city of Tyre, it was only a particular affair like that of Syagrius. But, behold the Jewish pontiff goes forth to meet him. Listen to the oracle of Jupiter Hammon. Recollect how he had been predicted at Gordium. See what a number of towns crowd, as it were, to fubmit to him; and how all the Satraps and grandees come to pay him obeifance. He puts on the Persian dress; this is Clovis's confular robe. Does not Darius offer him one half of his kingdom? Is not Darius murdered like a tyrant? Do not the mother and wife of Darius weep at the death of Alexander? Were Quintus Curtius, Arrian, or Plutarch, Alexander's cotemporaries? Has not the invention of \* printing afforded us great lights, which those authors wanted? Such is the history of the establishment of the French monarchy in Gaul.

## CHAP. XXV.

Of the French Nobility.

HE Abbe du Bos maintains, that at the beginning of our monarchy there was only one order of citizens among the Franks. This affertion, so injurious to the noble blood of our principal families, is equally affronting to the three great houses which successively governed this realm. The origin of their grandeur would not therefore have been lost in the obscurity of time. History might point out the ages when they were plebeian families; and to make Childeric, Pepin, and Hugh

<sup>+</sup> See the preliminary discourse of the Abbe du Bos.

Capet gentlemen, we should be obliged to trace their pedigree among the Romans or Saxons, that is, among the conquered nations.

This author grounds his opinion on the Salic law. By that law, he fays, it plainly appears, that there were not two different orders of citizens among the Franks: it allowed a composition of two hundred sous for the murder of any Frank whatsoever; but among the Romans it distinguished the king's guest, for whose death it gave a composition of three hundred sous, from the Roman proprietor to whom it granted a hundred, and from the Roman tributary to whom it gave only a composition of forty-sive. And as the difference of the compositions formed the chief distinction, he concludes that there was but one order of citizens among the Franks, and three among the Romans.

It is surprizing that his very mistake did not set him right. And indeed it would have been very extraordinary that the Roman nobility, who lived under the domination of the Franks, should have a larger composition, and been persons of much greater importance than the most illustrious among the Franks, and their greatest generals. What probability is there, that the conquering nation should have so little respect to themselves, and so great a regard for the conquered people? Besides, our author quotes the law of other barbarous nations, which proves that they had different orders of citizens. Now it would be a matter of

<sup>\*</sup> See the establishment of the French monarchy, vol. iii. book 6, chap. 4. pag. 304.

<sup>+</sup> He cites the 44th article of this law, and the law of the Ripusrians, tit. 7 and 36.

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aftonishment that this general rule should have failed only among the Franks. Hence he ought to have concluded either that he did not rightly understand, or that he misapplied, the passages of the Salic law; which really is the case.

Upon opening this law, we find that the composition for the death of an Antrustio, that is, of the king's vassal, was six hundred sous; and that for the death of a Roman, who was the † king's guest, was only three hundred. We find there also that the composition for the death of an ordinary Frank § was two hundred sous; and for the death of an ordinary Roman, was only one hundred. For the death of a Roman tributary, who was a kind of bondman or freedman, they paid a composition of forty-five sous: but I shall take no notice of this, no more than of the composition for the murder of a Frank bondman, or of a Frank freedman, because this third order of persons is out of the question.

What does our author do? He is quite silent with regard to the first order of persons among the Franks, that is the article relating to the Antrustio's; and afterwards upon comparing the ordinary Frank, for whose death they raid a composition of two hundred sous, with those whom he di-

<sup>•</sup> Qui in truste dominica est, tit. 44, sect 4. and this relates to the 13th formulary of Marculfus, de regis Antrustione. See also the title 66. of the Salic law, sect. 3 and 4. and the title 74. and the law of the Ripuarians, tit. 11. and the capitulary of Charles the Bald apud Caristacum, in the year 877. chap. 20.

<sup>†</sup> Salic law, tit. 44. fect. 6.

<sup>--</sup> Ibid. tit, 44. fect. 4.

<sup>§</sup> Tit. 44 fect. 1.

<sup>-</sup> Tit. 44. feet. 15.

<sup>\*</sup> Salic law, tit. 44. fect. 7.

stinguishes under three orders among the Romans, and for whose death they paid different compositions, he finds that there was only one order of citizens among the Franks, and that there were three among the Romans.

As the Abbe is of opinion that there was only one order of citizens among the Franks, it would have been lucky for him that there had been only one order also among the Burgundians, because their kingdom constituted one of the chief branches of our monarchy. But in their codes we find three kinds of compositions, one for the Burgundian or Roman nobility, the other for the Burgundians or Romans of a middling condition, and the third for those of a lower rank in both nations. He has not quoted this law.

It is very furprizing to see in what manner he evades those passages which press him hard on all sides. If you speak to him of the grandees, lords, and the nobility: these, he says, are mere distinctions of respect, and not of order; they are things of courtesy, and not legal privileges; or else, he says, those people belonged to the king's council; nay, they possibly might be Romans: but still there was only one order of citizens among the Franks. On the other hand, if you speak to him of some Franks of an inferior rank †,

--- Establishment of the French monarchy, vol. iii, book 6, chap.

TH 107

Si quis quolibet casu dentem optimati Burgundioni vel Romano notibili excussorit, solidos viginti quinque cogatur exsolvere; de mediocribus persenis ingenuis tam Burgundionibus quam Romanis sidens excussus fuerit, decem solidis componatur; de inferioribus personis quinque solidos, art. 1, 2, and 3. of tit. 26, of the law of the Burgundians.

<sup>+</sup> Establishment of the French monarchy, vol. iii. chap. 5. p. 319, and 320.

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er he rd on idees, mere ey are s; or king's nans: ens af you nk +.

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, chap.

p. 319,

he fays, they are bondmen; and thus he interprets the decree of Childebert. But I must stop here a little, to enquire farther into this decree. Our author has rendered it famous by availing himfelf of it in order to prove two things; the one +, that all the compositions we meet with in the laws of the. Barbarians were only civil fines added to corporal punishments, which entirely subverts all the ancient records; the other, that all freemen were judged directly and immediately by the king +, which is contradicted by a vast number of passages and authorities informing us of the - judiciary order of those times.

This decree, which was made in an affembly \* of the nation, fays, that if the judge finds a notorious robber, he must command him to be tied, in order to be carried before the king, fi Francus fuerit; but if he is a weaker person (debilior persona), he shall be hanged on the spot. According to the Abbe du Bos, Francus is a freeman, debilior perfona is a bondman. I shall defer entering for a moment into the fignification of the word Francus. and begin with examining what can be understood by these words, a weaker person. In all languages whatfoever, every comparison necessarily supposeth

<sup>#</sup> Establishment of the French monarchy, vol. iii book 6. chap. 4. pag: 307 and 308.

<sup>†</sup> Ibid, pag. 309, and in the following chapter, pag. 319 and 320.

<sup>-</sup> See the 28th book of this work, chap. 28. and the 31st book, chap. 8.

<sup>.</sup> Itaque Colonia convenit & ita bannivimus, ut unusque judex criminosum latronem ut audierit, ad casam suam ambulct & ipsum ligare faciat; ita ut si Francus fuerit, ad nostram presentiam dirigatur; & si debilier persone fuerit, in loco pendatur. Capitulary, of Baluzius's edition, tom. i. pag. 19.

three terms, the greatest, the less degree, and the If none were here meant but freemen and bondmen, they would have faid a bondman, and not a man of less power. Therefore debilior perfond does not fignify a bondman but a person of a superior condition to a bondman. Upon this suppolition, Francus cannot mean a freeman but a powerful man; and this word is taken here in that acceptation, because among the Franks there were always men who had a greater power than others in the state, and it was more difficult for the judge or count to chastise them. This explication agrees very well with many capitularies ---, where we find the cases in which the criminals were to be carried before the king, and those in which it was otherwife.

It is mentioned in the life of Lewis the Pious is written by Tegan, that the bishops were the principal cause of the humiliation of that emperor, especially those who had been bondmen, and such as were born among the Barbarians. Tegan thus addresses Hebo, whom this prince had drawn from the state of slavery, and made archbishop of Rheims. "What recompence id did the emperor receive from you for so many benefits? He made you a freeman, but did not enoble you, because he could not give you nobility after having given you your liberty."

THIS discourse, which proves so strongly the two

See the 28th book of this work, chap. 28. and the 31st book, chap. 8.

f Chap. 43 and 44.

<sup>•</sup> O qualem remunerationem reddidissi ei! fecit te liberum, non nobilem, quod impossibile est post libertatem. Capitulary, of Paluzius's edition, tom i pag. 19.

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orders of citizens, does not at all confound the Abbe du Bos. He answers thus \*: " The meaning of " this passage is not, that Lewis the Pious was in-" capable of introducing Hebo into the order of the " nobility. Hebo, as archbishop of Rheims, must " have been of the first order, superior to that of " the nobility." I leave the reader to judge, whether this be not the meaning of that paffage; I leave him to judge whether there can be any queftion here concerning a precedency of the clergy "This paffage proves only; over the nobility. " continues the same writer +, that the free-born " subjects were qualified as noblemen; in the " common acceptation, noblemen and men who are " free-born have for this long time fignified the " fame thing." What! because some of our burghers have lately affumed the quality of noblemen, shall a passage of the life of Lewis the Pious be applied to this fort of people? " And perhaps, " continues he still ", Hebo had not been a bond-" man among the Franks, but among the Saxons, " or some other German nation, where the people " were divided into feveral orders." Then because of the Abbe du Bos's perhaps there must have been no nobility among the nation of the Franks. But he never applied a perhaps so badly. We have feen that Tegan & distinguishes the bishops, who had opposed Lewis the Pious, some of whom had

Establishment of the French monarchy, vol. iii, book 6. chap.
 Pag. 3.

<sup>+</sup> Establishment of the French monarchy.

<sup>·</sup> Ibid.

<sup>§</sup> Omnes episcopi molesti fuerunt Ludovico, & maxime ii quos e servile conditione bororatos habebat, cum bis qui ex barbaris nationibus ad hocfassigium perdusti sunt. De gejis Ludovici Pii, chap. 43, and 44.

been bondmen, and others of a barbarous nation. Hebo belonged to the former and not to the latter. Besides, I do not see how a bondman, such as Hebo, can be said to have been a Saxon or a German: a bondman has no family, and consequently no nation. Lewis the Pious manumitted Hebo; and as bondmen after their manumission, embraced the law of their master, Hebo was become a Frank, and not a Saxon or German.

I HAVE been hitherto acting offenfively; it is now time to defend myself. It will be objected to me, that indeed the body of the Antrustio's formed a distinct order in the state, from that of the freemen: but as the fiefs were at first precarious, and afterwards for life; this could not form a nobleness of descent, since the privileges were not annexed to an hereditary fief. This is the objection which induced Mr. de Valos to think, that there was only one order of citizens among the Franks; an opinion which the Abbe du Bos has borrowed of him, and which he has absolutely fpoiled with fo many bad arguments. Be that as it may, it is not the Abbe du Bos that could make this objection. For after having given three orders of Roman nobility, and the quality of the king's guest for the first, he could not pretend to fay, that this title was a greater mark of a noble descent than that of Antrustio. But I must give a direct answer. The Antrustio's or trusty men were not fuch, because they were possessed of a fief, but they had a fief given them because they were Antrustio's or trusty men. The reader may please to recollect what has been faid in the beginning of this book. They had not at that time, as they had afterwards, the same fief: but if they had not

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that, they had another, because the fiefs were given at their birth, and because they were frequently granted in the affemblies of the nation, and, in short, because as it was the interest of the nobility to receive them, it was also the king's interest to grant them. These families were distinguished by their dignity of trusty men, and by the privilege of being qualified to fwear allegiance for a fief. In the following book \*, I shall demonstrate from the circumstances of time that there were freemen, who were permitted to enjoy this great privilege, and of course to enter into the order of nobility... This was not the case at the time of Gontram, and his nephew Childebert; but so it was at the time of Charlemain. But though in that prince's reign. the freemen were not incapable of possessing fiefs, yet it appears by the above-cited passage of Tegan, that the freedmen were absolutely excluded. Will the Abbe du Bos +, who carries us to Turky, to give. us an idea of the ancient French nobility; will he, I fay, pretend that they ever complained among the Turks of the elevation of people of low birth to the honours and dignities of the state, as they complained under Lewis the Pious and Charles the Bald? There was no complaint of that kind under Charlemain, because this prince always distinguished the ancient from the new families; which Lewis the Pious and Charles the Bald did not.

THE public should not forget the obligation its owes to the Abbe du Bos for several excellent performances. It is by these works, and not by his

\* Chap. 23.

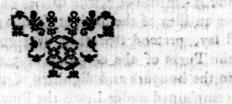
<sup>♦</sup> Establishment of the French monarchy, vol. iii. book 6. chap.

history of the establishment of the French monarchy we ought to judge of his merit. He committed very great mistakes, because he had the count of Boulainvillier's works more in view than his own subject.

I SHALL draw only one reflection from all these strictures; if so great a man was mistaken, what

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BOOK XXXI.

Theory of the feudal Laws among the Franks, in the relation they bear to the Revolutions of their Monarchy.

#### CHAP. I.

Changes in the Offices and in the Fiefs.

THE counts were at first sent into their districts only for a year; but they soon purchased the continuation of their offices. We have an example of this in the reign of Clovis's grand-children. A person called Peonius was count in the city of Auxerre; he sent his son Mummolus with money to Gontram, to prevail upon him to continue him in his employment; the son gave the money for himself, and obtained the father's place. The kings had already begun to spoil their own favours.

Though by the laws of the kingdom the fiefs were precarious, yet they were neither given nor taken away in a capricious and arbitrary manner; nay, they were generally one of the principal fubjects debated in the national affemblies. It is natural however to suppose, that corruption had seized this, as well as the other article; and that the possession of the fiefs, like that of the counties, was continued for money.

<sup>4</sup> Gregory of Tours, book iv. chap. 42.

I SHALL shew in the course of this book \*, that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the former grants; this occasioned a general discontent in the nation, and was soon followed with that famous revolution in the French history, whose first epocha was the astonishing spectacle of the execution of Brunechild.

THAT this queen, who was daughter, fifter, and mother to fo many kings, a queen to this very day celebrated for public monuments worthy of a Roman Ædile or Proconful, born with an admirable genius for affairs, and endowed with qualities fo long respected, should see herself - of a sudden expeled to fo flow, fo ignominious and cruel a torture, by † a king whose authority was but indifferently established in the nation, would appear very furprizing, had she not incurred that nation's difpleasure for some particular cause. Clotharius reproached + her with the murder of ten kings; but two of them he had put to death himself; the death of some of the others was owing to chance, or to the villainy of another queen; and a nation that had permitted Fredegunda & to die in her bed; that had even opposed the punishment of her flagitious crimes, ought to have been very indifferent with regard to those of Brunechild.

SHE was put upon a camel, and led ignominioully through the army: a certain fign that she had

<sup>·</sup> Chap. 7.

<sup>--</sup> Fredegarius's chronicle, chap. 42.

<sup>†</sup> Clotharius II. fon of Chilperic, and father of Dagobert.

<sup>4</sup> Fredegarius's chronicle, chap. 42.

<sup>§</sup> See Gregory of Tours, book vili, chap 31.

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given great offence to those troops. Fredegarius relates, that Protarius +, Brunechild's savourite, stripped the lords of their property, and filled the exchequer with the plunder; that he humbled the nobility, and that no person could be sure of continuing in ony office or employment. The army conspired against him, and he was stabbed in his tent; but Brunechild, either by revenging \* his death, or by pursuing the same plan, became every day more despicable \* to the nation.

CLOTHARIUS, ambitious of reigning alone, inflamed moreover with the most furious revenge, and certain of perishing if Brunechild's childrengot the upper hand, entered into a conspiracy asgainst himself; and whether it was owing to ignorance, or to the necessity of his circumstances, he became Brunechild's accuser, and made a dreadful example of that princess.

WARNACHARIUS had been the very foul of the conspiracy formed against Brunechild; being at that time mayor of Burgundy, he made of Clotharius consent, that he should not be displaced while he lived. By this step the mayor could no longer be in the same case as the French lords before that period; and this authority began to render itself independent of the regal dignity.

<sup>+</sup> Sava illi fuit contra personas iniquitas, sisco nimium tribuens, de rebus personarum ingeniose siscum velleus implere . . . ut nullus reperiretur qui gradum-quem arripueran potuisset adsumere. Fred. Chron. cap. 27. in the year 605.

<sup>\*</sup> Ibid. cap. 28. in the year 607.

<sup>\*</sup> Ibid. cap. 41. in the year 613. Burgundia Farones, tam episcopiquam cateri Leudes, timentes Brunechildem et odium in eam habentes, consilium inientes, &c.

ne unquam vita fue temporibus degradaretur.

IT was Brunechild's unhappy regency, which had exasperated the nation. So long as the lawsfublisted in their full force, no one could complain at having been deprived of a fief, fince the law did not bestow it upon him in perpetuity. But when fiefs came to be acquired by avarice, by bad practices and corruption, they complained of being divested by irregular means, of things that had been irregularly acquired. Perhaps if the public good had been the motive of the revocation of those grants, nothing would have been faid: but they pretended a regard to order, while they were openly abetting the principles of corruption; the fifcal rights were claimed, in order to lavish the public treasure; and grants were no longer the reward or the encouragement of fervices. Brunechild, from a corrupt spirit, wanted to reform the abuses of the ancient corruption. Her caprices were not owing to weakness; the vassals and the great officers thinking themselves in danger, prevented their own, by her destruction.

WE are far from having all the records of the transactions of those days; and the writers of chronicles, who understood very near as much of the history of their time, as our peasants know of ours, are extremely barren. Yet we have a constitution of Clotharius, given • in the council of Paris tor the reformation of † abuses, which shews that this prince put a stop to the complaints that had occasioned the revolution. On the one hand, he

Some time after Brunechild's execution, in the year 61-5. See Baluzius's edition of the capitularies, p. 21.

<sup>†</sup> Qua contra rationis ordinem alla vel ordinata funt, ne in antea, quod avertat divinitas, contingant, disposuerimus, Christo prasule, per hujus edili tenorem generaliter emendare. Ibid, art. 16.

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confirms \* all the grants that had been made or confirmed by the kings his predeceffors; and on the other, he ordains or that whatever had been taken from his vaffals, should be restored to them.

THIS was not the only concession the king made in that council; he enjoined that whatever had been innovated, in opposition to the privileges of the clergy, should be redressed &; and he moderated the influence of the court in the - elections of bishops. He even reformed the fiscal affairs : ordaining that all the new ¶ census's should be abolished, and that they should not levy any toll established fince the death of Gontram, Sigebert, and Chilperic; that is, he established whatever had been done during the regencies of Fredegunda and Brunechild. He forbad the driving of his cattle to graze in private people's grounds; and we shall foon fee that the reformation was still more general, fo as to extend even to civil affairs.

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Baluzius's edition of the capitularies, art. 16. or Ibid. art. 32 and the general haute ad Line & W.

<sup>§</sup> Et quod per tempora ex hoc pretermissum est vel debine perpetualiter obferveture

<sup>-</sup> Ita ut episcopo decedente in loco ipsius qui a Metropolitano ordinari debet cum principalibus, a clero et populo eligatur; et si persona condigna fuerit, per ordinationem principis ordinetur; vel certe si de palatio eligitur, per meritum persona & dostrina ordinetur. 1bid. art. 1:

<sup>1</sup> Ut ubicumque census novus impie additus est, emendetur. art. 8, of Hidyant o. Com v at the to the hard and the

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How the civil government was reformed.

Itherto the nation had given marks of impatience and levity, with respect to the choice or conduct of her masters; she had regulated their differences, and obliged them to come to an agreement amongst themselves. But now she did what before was quite unexampled; she cast her eyes on her actual situation, examined the laws cooly, provided against their insufficiency, repressed violence, and moderated the regal power.

THE bold and infolent regencies of Fredegunda and Bruneshild, had less astonished than roused the nation. Fredegunda had desended her horrid cruelties, her poisonings and assassinations by a repetition of the same crimes; and had behaved in such a manner that her outrages were rather of a private than public nature. Fredegunda did more mischies: Bruneshild threatened more. In this crisis, the nation was not satisfied with rectifying the seudal system; she was likewise determined to secure her civil government. For the latter was rather more corrupt than the former; a corruption the more dangerous as it was more inveterate, and connected rather with the abuse of manners than with that of laws.

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THE history of Gregory of Tours exhibits, on the one hand, a fierce and barbarous nation; and on the other, kings remarkable for the same serocity of temper. Those princes were savage, iniquitous, and cruel, because such was the character of the whole nation. If Christianity appeared someEr.

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times to foften their manners, it was only by the circumstances of terror with which this religion alarms the finner: the church supported herself-against them by the miraculous operations of her faints. The kings would not commit facrilege, because they were afraid of the punishments inflicted on that species of guilt: but this excepted, either in the riot of passion, or in the coolness of deliberation, they perpetrated the most horrid crimes and barbarities, where the divine vengeance did not appear fo immediately to overtake the criminal. The Franks, as has been already observed, bore-with cruel kings, because they were of the same dispofition themselves; they were not shocked at the iniquity and extortions of their princes, because this was the national characteristic. There had been feveral laws established, but it was usual for the king to defeat them all, by a kind of letters called precepts \*, which rendered them of no effect; they were fomewhat fimilar to the rescripts of the Roman emperors, whether it be that our king borrowed this custom of those princes, or whether it was owing to their own natural temper. We fee in Gregory of Tours, how they perpetrated murder in cool blood, and put the accused to death, unheard; how they gave precepts + for illicit marriages; for transferring fuccessions; for depriving relations of their right; and, in short, marrying confecrated virgins. They did not indeed affume

\* They were orders which the king fent to the judges to do or to tolerate things contrary to law.

<sup>†</sup> See Gregory of Tours, book iv. p. 227. Both our history and the charters are full of this; and the extent of these abuses appears especially in Clotharius's constitution, inserted in the edition of the capitularies made to reform them. Baluzius's edition, p. 7.

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the whole legislative power, but they dispensed with

CLOTHARIUS's constitution redressed all these grievances; no one -- could any longer be condemned without being heard; relations \* were made to fucceed according to the order established by law; all precepts for marrying religious women were declared null; \* and those who had obtained and made use use of them, were severely punished. We might know perhaps more exactly his determinations with respect to these precepts, if the thirteenth and the two next articles of this decree had not been loft through the injury of time. We have only the first words of this thirteenth article, ordaining that the precepts shall be observed, which cannot be understood of those he had just abolished by the same law. We have another constitution + by the same prince, which is relative to his decree, and corrects in the same manner every article of the abuses of the precepts.

I'r is true, that Baluzius finding this constitution without date, and without the name of the place where it was given, attributes it to Clotharius I. But I say it belongs to Clotharius II. for three reasons; 1. it says that the king will preserve the immunities § granted to the churches, by his father and grandfather. What immunities could the churches receive from Childeric grandfather of Clotharius I. who was not a Christian, and who lived

<sup>---</sup> Art. 22.

<sup>.</sup> Ibid. art. 6.

<sup>.</sup> Ibid.

<sup>+</sup> In Baluzius's edition of the capitularies, tom. i. p. 7.

<sup>§</sup> In the preceding book I have made mention of those immunities, which were grants of judicial rights, and contained prohibitions to the regal judges to perform any function in the territory, and were equivalent to the erection or grant of a fief.

even before the foundation of the monarchy? But if we attribute this decree to Clotharius II. we shall find his grandfather to have been this very Clotharius I. who made immense donations to the church, with a view of expiating the murder of his fon Cramne, whom he had commanded to be burnt, together with his wife and children.

2. THE abuses redressed by this constitution, were still subfisting after the death of Clotharius I. and were even carried to their highest extravagance during the weak reign of Gontram, the cruel administration of Chilperic, and the execrable regencies of Fredegunda and Brunechild. Now can we imagine that the nation would have born with grievances fo folemnly profcribed, without complaining of their continual repetition? Can we imagine she would not have taken the same step as the did afterwards under Childeric II. + when upon a repetition of the old grievances, she pressed + him to ordain that the law and customs with respect to judicial proceedings should be complied with, as formerly?

In a word, as this conflitution was made to redress grievances, it cannot relate to Clotharius I. fince there were no complaints of that kind in his reign, and his authority was perfectly established throughout the kingdom, especially at the time in which they place this conftitution; whereas it agrees extremely well with the events that happened during the reign of Clotharius II. which produced a revolution in the political state of the kingdom. History must be illustrated by the laws, and the laws by history. maken the law of the Language of

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<sup>♦</sup> He began to reign towards the year €70.

<sup>+</sup> See the life of S. Leger.

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### Authority of the Mayors of the Palace.

To deprive Warnacharius II. had promifed not to deprive Warnacharius of his mayor's place during life; a revolution productive of another effect. Before that time the mayor was the king's officer, but now he became the officer of the people; he was chosen before by the king, and now by the nation. Before the revolution Protarius had been made mayor by Theodoric, and Landeric by Fredegunda; but after that the mayors were chosen by the nation †.

We must not therefore confound, as some authors have done, these mayors of the palace with such as were possessed of this dignity before the death of Brunechild; the king's mayor's with those of the kingdom. We see by the law of the Burgundians, that among them the office of mayor was not one of the 1 most respectable in the state; nor was it one of the most eminent I under the first kings of the Franks.

CLOTHARIUS removed the apprehensions of those who were possessed of employments and fiels;

<sup>\*</sup> Instigante Brunechilde, Theodorico jubente, &c.: Fredegarius, chap. 27. in the year 605.

Gesta regum Francorum. cap. 36.

<sup>+</sup> See Fredegarius, chronicle, chap. 54. in the year 626, and his anonymous continuator, chap. 102. in the year 695. and chap. 105.
in the year 715. Aimoin, book 4. chap. 15. Eginhard, life of Charlemain, chap. 48. Gesta rerum Francorum, chap. 45.

A See the law of the Burgundians in prafat, and the feeond fup-

<sup>9</sup> See Gregory of Tours, book is. chap. 36.

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and when after the death of Warnacharius & he asked the lords assembled at Troyes, who it is they would put in his place; they cried out they would chuse no one, but suing for his favour, committed themselves entirely into his hands.

DAGOBERT reunited the whole monarchy in the same manner as his father; the nation had a thorough confidence in him, and appointed no mayor. This monarch finding himself at liberty, and elated by his victories, resumed Brunechild's plan. But he succeeded so ill, that the vassals of Austrasia let themselves be beaten by the \*Sclavonians, and returned home; so that the marches of Austrasia were left a prey to the Barbarians.

HE determined then to make an offer to the Austrasians, of resigning that country, together with a provincial treasure, to his son Sigebert, and to put the government of the kingdom and of the palace into the hands of Cunibert bishop of Cologne, and of the duke Adalgisus. Eredegarius does not enter into the particulars of the conventions then made; but the king consirmed them all by charters, and † Austrasia was immediately secured from danger.

DAGOBERT finding himself near his end, re-

supports of ballery of the contact of

<sup>§</sup> Eo anno Clotharius cum proceribus & leudibus Burgundia Trecassinis conjugitur, cum corum esset sollicitus si vellent jam Warnuchario discesso alium in ejus honoris sublimare: sed omnes unanimiter denegantes se nequaquam velle majorem domus eligere, regis gratiam obnise petentes, cum rege transfegere. Fredegarius, chronicle, chap. \$4. in the year 616.

<sup>\*</sup> Islam victorium quam Winidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit, quantum dementatio Austrasiorum, dum se cernebant cum Dagobero odium incurrisse, & assidue expoliarentur. Fredegarius's chronicle, chap. 68. in the year 630.

<sup>†</sup> Deinceps Austrasii eorum studio limitem & regnum Francorum com-

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commended his wife Nentechildis, and his son Clovis to the care of Æga. The vassals of Neustria and Burgundy chose \* this young prince for their king. Æga and Nentechildis had the government of 1 the palace; they restored whatever Dagobert had taken; and complaints ceased in Neustria and Burgundy, as they had ceased in Austrasia.

AFTER Æga's death, the queen Nentechildis engaged the lords of Burgandy to chuse Floachatus for their mayor. The latter dispatched letters to the bishops and chief lords of the kingdom of Burgundy, by which he promised to preserve their honours and dignities \* for ever, that is, during life. He confirmed his word by oath. This is the period, at which † the author of the treatise of the palace fixes the administration of the kingdom by those officers.

FREDEGARIUS being a Burgundian, has entered into a more minute detail, as to what concerns the mayors of Burgundy, at the time of the revolution of which we are speaking, than with regard to the mayors of Austrasia and Neustria. But the conventions made in Burgundy were, for the very same reasons, agreed to in Neustria and Austrasia.

tra Winidos utiliter defensaffe noscuntur. Fredegarius's chronicle, chap.

<sup>+</sup> Fredegarius's chronicle, chap, 79. in the year 638.

<sup>4 1</sup>bid.

<sup>-</sup> Ibid. chap. 80. in the year 639.

<sup>--</sup> Ibid. chap. 89. in the year 641.

<sup>\*</sup> Ibid. chap. 89. Floachatus cunctis ducibus a regno Burgundia feu & pontificibus, per opistolam etiam et sacramentis sirmavit unicuique gradum bonoris et dignitatem, seu et amicitiam, perpetuo conservare.

<sup>+</sup> Deinceps a temporibus Clodovei qui fuit filius Dagoberti inclyti regis, pater vero Theodorici, regnum Francorum decidens permajores domus, capit ordinari, De majoribus domus regia.

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The nation thought it safer to lodge the power in the hands of a mayor whom she chose herself, and to whom she might prescribe conditions, than in those of a king whose power was hereditary.

#### CHAP. IV.

Of the Genius of the Nation with respect to the Mayors.

A Government, in which a nation that had an hereditary king, chose a person to exercise the regal authority, seems very extraordinary; but independently of the circumstances of the times. I apprehend that the notions of the Franks with respect to this article were derived from a higher source.

THE Franks were descended from the Germans, of whom Tacitus \* fays, that in the choice of their king they were determined by his noble extraction; and in that of their leader, by his valour. This gives us an idea of the kings of the first race, and of the mayors of the palace; the former were hereditary, the latter elective.

No doubt but those princes, who stood up in the national assembly, and offered themselves as the conductors of a public enterprise to such as were willing to sollow them, united, generally in their own person, both the power of the mayorand the king's authority. By the splendor of their descent they had attained the regal dignity: and their military abilities having recommended them to the command of armies, they rose to the power

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of mayor. By the regal dignity our first kings presided in the courts and assemblies, and enacted laws with the national consent; by the dignity of duke or leader, they undertook expeditions, and commanded the armies.

In order to be acquainted with the genius of the primitive Franks in this respect, we have only to cast an eye on the conduct • of Argobastes, a Frank by nation, on whom Valentinian had conferred the command of the army. He confined the emperor to his own palace; wherehe would allow nobody to speak to him concerning either civil or military affairs. Argobastes did at that time what the Pepins practifed afterwards.

#### CHAP. V.

In what manner the Mayors obtained the command of the Armies.

So long as the kings commanded their armies in person, the nation never thought of chusing a leader. Clovis and his four sons were at the head of the Franks, and led them on through a series of victories. Theobalt son of Theodobert, a young, weak, and sickly prince, was the first of our kings that confined himself to his palace. He resused to undertake an expedition into Italy against Narses, and had \* the mortification to see the Franks chuse themselves two chiefs, who led them

<sup>4</sup> See Sulpicius Alexander in Gregory of Tours. book 2.

In the year 352.

Leutharis vero et Butilinus, tametsi id regi ipsorum minime placebat, telli cum eis societatem inierunt. Agathias, book 1. Gregory of Tours, book 4. chap. 9.

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cebat, ours, against the enemy. Of the four sons of Clotharius I. Gontram † was the least sond of commanding his armies; the other kings sollowed this example; and, in order to intrust the command without danger into other hands, they conferred it upon several chiefs or dukes \*.

THE inconveniencies were numberless which thence arose; all discipline was lost, no one would any longer obey. The armies were dreadful only to their own country; they were loaden with spoils, before they had reached the enemy. Of these miseries we have a very lively picture in Gregory of Tours. "How shall we be able to obtain a victory, said Gontram, we who do not so much as keep what our ancestors acquired? Our nation is no longer the same...." Strange, that it should be on the decline so early as the reign of Clovis's grandchildren!

IT was therefore natural they should determine at last upon an only duke, a duke invested with an authority over this prodigious multitude of seudal lords and vassals, who were now become strangers to their own engagements; a duke who was to establish the military discipline, and to put himself at the head of a nation unhappily practised in ma-

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<sup>+</sup> Goutram did not even march against Gondovald, who stiled himself son of Clotharius, and claimed his share of the kingdom.

<sup>\*</sup> Sometimes to the number of twenty. See Gregory of Tours, book 5. chap. 27. book 8. chap. 18. and 30. book 10. chap. 3. Dagobert, who had no mayor in Burgundy, observed the same policy, and sent against the Gaseons ten dukes and several counts who had no dukes over them. Fredegarius's chronicle, chap. 78. in the year 636

<sup>#</sup> Gregory of Tours, book 8. chap. 30. and book 10. chap. 3. Ibid. book 8. chap. 30.

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king war against itself. This power was conferred on the mayors of the palace.

THE original function of the mayors of the palace was the management of the king's houshold. They had afterwards, in conjunction - with other officers, the political government of fiefs; and at length they obtained the fole disposal of them. They had likewise the administration of military asfairs and the command of the armies; employments necessarily connected with the other two. In those days it was much more difficult to raise than to command the armies; and who but the difpenfer of favours could have this authority? In this martial and independent nation, it was prudent to invite, rather than to compel; prudent to give away or to promife the fiefs, that should happen to be vacant by the death of the possessor; prudent, in fine, to reward continually, and to raise a jealoufy with respect to preferences. It was therefore right, that the person who had the superintendency of the palace, should likewise be general of the army.

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#### CHAP. VI.

Second epocha of the Humiliation of our Kings of the first race.

A FTER the execution of Brunechild, the mayors were administrators of the kingdom under the sovereigns; and though they had the conduct of the war, yet the kings were always at

<sup>---</sup> See the fecond supplement to the law of the Burgundians, tit. 13. and Gregory of Tours, book 9. chap. 36.

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the head of the armies, and the mayor and the nation fought under their command. But the victory of duke Pepin over Theodoric and his mayor. completed \* the degradation of our princes; and that I which Charles Martel obtained over Chilperic and his mayor Rainfroy, confirmed it. strasia triumphed twice over Neustria and Burgundy; and the mayoralty of Australia being annexed as it were to the family of the Pepins, this mayoralty and family became greatly superior to all the rest. The conquerors were then afraid left some person of credit should seize the king's person, in order to excite disturbances. For this reason they kept \* them in the royal palace as in a kind of prison, and once a year shewed them to the people. There they made ordinances, but + these were such as were dictated by the mayor; theyanswered ambassadors, but the mayor made the answers. This is the time mentioned by & historians of the government of the mayors over the kings whom they held in fubiec-

THE extravagant passion of the nation for Pepin's family went fo far, that they chose one of his grandsons, who was yet a child, for mayor; and

◆ See the annals of Metz, year 687. and 688.

Annals of Metz, year 719.

\* Sedamque illi regalem sub sua ditione concessit. Ibid. anno 719.

+ Ex chronico Centulensi, lib 2. ut responsa qua erat edoctus, vel potius juffus, ex fur velut potestate redaeret.

+ Posthec Theudoaldus filius ejus (Grimoaldi) parvulus in loco ipsius, M

Illis quidem nomina regum imponens, ipse totius regni habens privilegium, &c. Annals of Metz, year 695.

<sup>5</sup> Annals of Metz, anno 691. Anno principatus Pippini super Theodoricum . . . . . Annals of Fuld, or of Laurisham, Pippinus dux Francorum obtinuit regum Francorum per annos, 27, cum regibus sibi subjettis.

put him over one Dagobert, that is one phantom over another.

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#### CHAP. VII.

Of the great Offices and Fiefs under the Mayors of the Palace.

viving the precariousness of posts and employments: for indeed their power was owing to the protection which in this respect they had granted to the nobility. Hence the great offices were continued to be given for life, and this custom was daily more firmly established.

But I have some particular resections to make here with regard to siess: and in the first place I do not question but most of them became hereditary from this time.

In the treaty of Andeli \*, Gontram and his nephew Childebert engage to maintain the donations made to the vassals and churches by the kings his predecessors; and leave is given to the \* wives, daughters and widows of kings, to dispose by will and in perpetuity of whatever they hold of the exchequer.

MARCULEUS wrote his formularies at the time-

cum predicto rege Dagolerto, major-domus palatii effectus est. The anonymous continuator of Fredegarius in the year 714. chap. 104.

\* Cited by Gregory of Tours, book 9. See also the edict of Cloharius II. in the year 615. art. 16.

\* Ut si quid de agris fiscalibus vel speciebus atque presidio pro arbitrii sui voluntate sucere aut cuiquam conferre voluerint, sixa stabilitate perpetuo conservetur.

- See the 24th and the 34th of the first book.

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of the mayors. We find feveral † in which the kings make donations both to the person and to his heirs: and as the formularies represent the common actions of life, they prove that part of the fiefs were become hereditary towards the end of the first race. They were far from having in those days the idea of an unalienable demesne; this is a modern thing, which they knew neither in theory nor practice.

In proof hereof positive facts shall soon be produced; and if we can point out a time in which there were no longer any benefices for the army, nor any funds for its support; we must certainly conclude that the ancient benefices had been alienated. The time I mean is that of Charles Martel, who sounded some new siefs, which we should carefully distinguish from those of the earliest date.

WHEN the kings began to make grants in perpetuity, either through the corruption which crept into the government, or by reason of the constitution itself, which continually obliged those princes to confer rewards; it was natural they should begin with giving the perpetuity of the siefs, rather than of the counties. For to deprive themselves of some acres of land was no great matter; but to renounce the right of disposing the great offices, was divesting themselves of their very power.

<sup>+</sup> See the 14th formula of the first book, which is equally applicable to the fiscal estates given directly and in perpetuity, or given at first as a benefice, and afterwards in perpetuity: Sient abillo aut a figco nostro fuit possess. See also the 17th formula, ibid.

#### CHAP. VIII.

In what manner the allodial Estates were changed into Fiefs.

THE manner of changing an allodial estate into a sief, may be seen in a formulary of Marculfus. The owner of the land gave it to the king, who restored it to the donor by way of usufruit, or benefice, and then the latternominated his heirs to the king.

In order to find out the reasons which induced them thus to change the nature of the allodia, I must trace the source of the ancient privileges of our nobility, a nobility who for these eleven centuries have been ready to undergo every hardship, and to shed their blood in their country's service.

THEY who were seized of sies enjoyed very great advantages. The composition for the injuries done them was greater than that of freemen. It appears by the formularies of Marculfus, that it was a privilege belonging to the king's vassal, that whoever killed him should pay a composition of six hundred sous. This privilege was established by the Salic law , and by that of the Ripuarians; and while these two laws ordained a composition of six hundred sous for the murder of the king's vassal, they gave but + two hundred sous for the murder of a person freeborn, if he was a Frank or Barbarian

<sup>4</sup> Book 1. formulary 13.

Tit. 44. See also the titles 66. fect. 3. and a and tir. 74.

<sup>-</sup> Tit. 2.

<sup>+</sup> See also the law of the Ripuarians, tit 7, and the Salic law tit.

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living under the Salic law; and only a hundred for a Roman.

This was not the only privilege belonging to the king's vaffals. When a man was fummoned in court, and did not make his appearance, nor obey the judges commands, he was appealed before the king; and if he perfifted in his contumacy, he was excluded from \* the Royal protection, and no one was permitted to entertain him, or even to give him a morfel of bread. Now if he was a person of an ordinary condition, his goods were confifcated; but if he was the king's vaffal, they were not -The first by his contumacy was deemed sufficiently convicted of the crime, the fecond was not; the former - for the smallest crimes was obliged to un= dergo the trial by boiling water, the latter + was condemned to this trial only in the case of murder: In short, the king's vasfal & could not be compelled to fwear in court against another vassal. These pris vileges every day augmented, and the capitulary of Carlomannus I does this honour to the king's vafe fals, that they shall not be obliged to swear in perfon, but only by the mouth of their own vaffals. Besides, when a person who had these honours did not repair to the army, his punishment was to abstain from flesh-meat and wine as long as he had been absent from the service; but a freeman | who

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<sup>+</sup> Salic law, tit. 59, and 76.

<sup>\*</sup> Extra fermonem regis. Salic law, tit. 59. and 76.

<sup>4</sup> Ibid. tit. 59. fect. r.

<sup>-</sup> Ibid. tit. 76. fect. 1.

<sup>-</sup>o- Ibid, tit. 56. and 59.

<sup>+</sup> Ibid. tit, 76. fect. 1.

<sup>6</sup> Ibid. tit. 76. feet. 2.

THE PARTY OF PARTY OF THE PARTY OF THE 4. Apud Vernis Palatium, in the year 883 art 4, and 11:

<sup>||</sup> Capitulary of Charlemain, in the year 812. art. 1. and 3-

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neglected to follow his count was fined \* fixty fous, and reduced to a state of slavery till he paid it.

It is very natural therefore to imagine that those Franks who were not the king's vassals, and much more the Romans, became fond of entering into the state of vassalage; and that they might not be deprived of their demesnes, they devised the usage of giving their allodium to the king, of receiving it from him afterwards as a sief, and of nominating their heirs. This usage was continued, and took place, especially during the times of consuson under the second race, when every man being in want of a protector, was desirous to incorporate himself with the other lords, and to enter, as it were, into the seudal monarchy, because the political no longer existed.

This continued under the third race, as we find by several + charters; whether they gave their all bodium, and resumed it by the same act; or whether it was declared an allodium, and afterwards acknowledged as a sief. These were called siefs of resumption.

This does not imply that those who were seized of siefs administered them with prudence and acconomy; for though the freemen grew desirous of being possessed of siefs, yet they managed this kind of estates as ususfruits are managed in our days. This is what induced Charlemain, the most vigilant and attentive prince we ever had, to make a

The Manager with the 12 to

<sup>\*</sup> Heribannum

<sup>†</sup> Non infirmis reliquit heredibus, says Lambert a Ardres in Du Cange, on the word alodis.

<sup>•</sup> See those quoted by Du Cange, in the word alodis, and those produced by Galland, in his treatise of allodial lands, pag. 14. and the following.

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great many regulations 1, to prevent the fiefs from being degraded in favour of allodial estates. It proves only that in his time most benefices were still only for life, and confequently that they took more care of the allodia than of the benefices; but it is no argument that they did not chuse rather to be the king's bondmen than freemen. They might have reasons for disposing of a particular portion of a fief, but they were not willing to be stripped even of their dignity.

I KNOW likewise that Charlemain complains in a certain capitulary ", that in some places there were people who gave away their fiefs in property, and redeemed them afterwards in the fame manner. But I do not fay, that they were not fonder of the property than of the ufufruit; I mean only, that when they could convert an allodium into a fief, which was to descend to their heirs, and is the case of the formulary above-mentioned, they had very great advantages in doing it.

#### country of This is obvious from our chief of C H A P. IX.

How the Church-lands were converted into Fiefs.

THE use of the fiscal lands should have been only to ferve as a donation, by which the kings were to encourage the Franks to undertake new expeditions, and by which on the other hand

Second capitulary of the year 802, art. 10. and the 7th capitulary of the year 803, art. 3. the rft capitulary incerti anni, art. 49. the 5th capitulary of the year 806, art. 7. the capitulary of the year 779. art 29. and the capitulary of Lewis the Pious, in the year 829.

<sup>---</sup> The 5th of the year 806. art. 8.

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these fiscal lands were increased. This, as I have before observed, was the spirit of the nation; but these donations took another turn. There is still extant • a speech of Chilperic, grandson of Clovis, in which he complains that almost all these lands had been already given away to the church. "Our exchequer, says he, is impoverished, and our riches are transferred to the clergy ; none reign now but bishops, who live in grandeur, while ours is quite eclipsed."

This was the reason that the mayors, who durst not attack the lords, stripped the churches; and one of the † motives alledged by Pepin for entering Neustria, was his having been invited thither by the clergy, to put a stop to the encroachments of the kings, that is, of the mayors, who deprived the church of all her possessions.

THE mayors of Austrasia, that is the family of the Pepins, had behaved towards the clergy with more moderation than those of Neustria and Burgundy. This is obvious from our chronicles 4, in which we see the monks perpetually extolling the devotion and liberality of the Pepins. They themselves had been possessed of the first places in the church. "One crow does not pull out the

<sup>4</sup> In Gregory of Tours, book vi chap. 46.

This is what induced him to annul the testaments made in favour of the clergy, and even the donations of his father; Gontram re-cstablished them, and even made new donations. Gregory of Tours, book vii, chap. 7.

<sup>†</sup> See the annals of Metz. year 687. Excitor imprimis querelis sacerdetum & servorum Dei, qui me sapius adierunt ut pro sublatis injuste patrimoniis, &c.

<sup>·</sup> See the annals of Metz.

"eyes of another;" as 1 Chilperic faid to the bi-

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PEPIN subdued Neustria and Burgundy; but as his pretence for destroying the mayors and kings was the grievances of the clergy, he could not strip the latter, without acting contrary to his own declaration, and shewing that he made a jest of the nation. However, the conquest of two great kingdoms and the destruction of the opposite party, afforded him sufficient means of satisfying his generals.

PEPIN made himself master of the monarchy, by protecting the clergy; his son Charles Martel could not maintain his power, but by oppressing them. This prince sinding that part of the regal and siscal lands had been given either for life, or in perpetuity to the nobility, and that the church by receiving both from rich and poor, had acquired a great part even of the allodial estates, he resolved to strip the clergy; and as the siess of the first division were no longer in being, he formed a second. He took for himself and for his officers the church-lands, and the churches themselves: thus he remedied an evil which differed from ordinary diseases, as its extremity rendered it the more easy to cure.

In Gregory of Tours.

<sup>\*</sup> Karolus plurima juri ecclesiastico detrabens predia fisco sociavit, ao: deinde militibus dispertivit. Ex Chronico Centulensi, lib. ii.

#### CHAP. X.

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### Riches of the Glergy.

O great were the donations made to the clergy, that under the three races of our princes they must have several times received the full property of all the lands of the kingdom. But if our kings, the nobility, and the people, found the way of giving them all their estates, they likewise found the method of getting them back again. Thespirit of devotion established a great number of churches under the first race; but the military spirit was the cause of their being given away afterwards to the foldiery, who divided them amongst their children. What a number of lands must have then been taken from the clergy's menfalia! The kings of the second race opened their hands, and made new donations to them; but the Normans, who came afterwards, plundered and laid waste all before them, wreaking their vengeance chiefly on the priefts and monks, and devoting every religious house to destruction. For they charged those ecelefiaftics with the subversion of their idols, and with all the oppressive measures of Charlemain, by which they had been fuccessively obliged to take shelter in the north. These wereanimosities which the space of forty or fifty years had not been able to obliterate. In this situation what a loss must the clergy have fustained! There were hardly ecclefiaftics left to demand the estates of which they had been deprived. There remained therefore for the religious piety of the third race, foundations enough to make, and lands to bestow. The opini-

ons which were broached and spread in those days, would have deprived the laity of all their estates, if they had been but honest enough. But, if the clergy were actuated by ambition, the laity were not without theirs; if dying persons gave their estates to the church, their heirs would fain resume them-We meet with continual quarrels between the lords and the bishops, the gentlemen and the abbots; and the clergy must have been very hard pressed, fince they were obliged to put themselves under the protection of certain lords, who granted them a momentary defence, and afterwards joined their oppreffors.

But a better administration having been established under the third race, gave the clergy leave to augment their possessions; when the Calvinists flarted up, and having pillaged the churches, they turned all the facred plate into specie. How could the clergy be fure of their estates, when they were not even fafe in their persons? They were debating on controverfial subjects, while their archives were What did it avail them to demand back of an impoverished nobility, those estates which were no longer in the possession of the latter, but had been conveyed into other hands by different mortgages. The clergy have been long acquiring, and have often refunded, and still there is. no end of their acquisitions.

#### CHAP. XI.

State of Europe at the Time of Charles Martel.

YHARLES Martel, who undertook to strip A the clergy, found himself in a most happy si-M 6

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tuation. He was both dreaded and beloved by the foldiery; whose interest he promoted, having the pretence of the war against the Saracens. He was hated indeed by the clergy, but he had no need of their assistance. The pope, to whom he was necessary, stretched out his arms to him. Every one knows, the samous membassy he received from Gregory III. These two powers were strictly united, because they supported each other: the pope stood in need of the Franks to assist him against the Lombards and the Greeks; the Franks had occasion for the pope, to serve for a barrier against the Greeks, and to embarrass the Lombards. It was impossible therefore for the enterprize of Charles Martel to miscarry.

S. EVCHERIUS, bishop of Orleans, had a vision which frightened all the princes of that time. I shall produce on this occasion the letter 1 written by the bishops assembled at Rheims to Lewis king of Germany, who had invaded the territories of Charles the Bald: because it will give us an insight into the situation of things in those times, and the temper of the people. They say ", " that S. " Eucherius having been snatched up into heaven, faw Charles Martel tormented in the bottom of hell by command of the saints, who are to sit " with Christ at the last judgment; that he had

<sup>+</sup> See the annals of Metz.

Epistolam quoque, decreto Romanorum principum, sibi pradictus praful Gregorius miserat, quod ses populus Romanus relicta imperatoris dominatione, ad suam desensionem & invictam elementiam convertere voluisset. Annals of Metz, year 741. Eo pacto patrato, ut a partibus imperatoris recederet. Fredegarius.

Anno 858 apud Carisianum; Baluzius's edition, tom. 1, pag.

<sup>-</sup>o- Ibid. art. 7. pag. 109.

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"been condemned to this punishment before his " time, for having stript the church of her posses-" fions, and thereby charged himfelf with the fine " of all those who founded these livings; that: " King. Pepin held a council upon this occasion. " and had ordered all the church-lands he could re-" cover to be reftored; that as he could get back " only a part of them, because of his disputes with " Vaifre, duke of Aquitaine, he iffued out letters " called precaria \* for the remainder, and made a " law that the laity should pay a tenth part of the " church-lands they possessed, and twelve deniers " for each house; that Charlemain did not give the "church-lands away; on the contrary, that he pub-" lished a capitulary, by which he engaged both " for himfelf and for his fuccessors never to make " any fuch grant; that all they fay is committed " to writing, and that a great many of them heard " the whole related by Lewis the Pious, the father " of those two kings."

KING Pepin's regulation, mentioned by the bifhops, was made in the council held at Leptines. The church found this advantage in it, that such as had received those lands, held them no longer but in a precarious manner; and moreover that she received the tythe or tenth part and twelve deniers for every house that had belonged to her. But this

Precaria, quod precibus utendum conceditur, says Cujas in his notes upon the first book of siefs. I find in a diploma of king Pepin, dated the third year of his reign, that this prince was not the first who established these precaria; he cites one made by the mayor Ebroin, and continued after his time. See the diploma of this king, in the 5th tom, of the historians of France by the Benedictins. art. 6.

<sup>#</sup> In the year 743. fee the 5th book of the capitularies, art. 3.

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was only a palliative, which did not remove the diforder.

NAY it met with opposition, and Pepin was obliged to make another capitulary, in which he enjoins those who held any of those benefices to pay this tythe and duty, and even to keep up the houses belonging to the bishopric or monastery, under the penalty of forseiting those possessions. Charlemain \* renewed the regulation of Pepin.

THAT part of the same letter which says, that Charlemain promised both for himself and for his successors, never to divide again the church-lands among the soldiery, is agreeable to the capitulary of this prince, given at Aix la Chapelle, in the year 803, with a view of removing the apprehensions of the clergy upon this subject. But the donations already made were still in † force. The bishops very justly add, that Lewis the Pious sollowed the example of Charlemain, and did not give away the church-lands to the soldiery.

AND yet the old abuses were carried to such a pitch, that the laity under the children of Lewis

ar fruit set, if all presents the break fromth wer

<sup>+</sup> That of Metz, in the year 736, art. 4.

<sup>&</sup>quot;See his capitulary in the year 803, given at Worms, Baluzius's edition, pag. 411. where he regulates the precarious contract; and that of Franckfort, in the year 794. pag. 267. art. 24. the relation to the repairing of the houses; and that of the year 800, pag. 330.

<sup>+</sup> As appears by the preceding note, and by the capitulary of Pepin king of Italy, where it fays, that the king would give the monalteries in fief to those who would swear allegiance for fiefs: it is added to the law of the Lembards, book iii. tit. r. sect. 30. and to the Salic laws, collection of Pepin's laws in Echard, pag. 195. tit. 26. art. 4.

<sup>1</sup> See the constitution of Lotharius I, in the law of the Lombards, book iii, law 1. fect. 43.

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the Pious preferred ecclesiastics to benefices, or turned them out of their livings, without the consent\* of the bishops. The benefices • were divided amongst the next heirs, and when they were held in an indecent manner, the bishops § had no other remedy left than to remove the relics.

By the capitulary † of Compiegne, it is enacted, that the king's commissary shall have a right to visit every monastery, together with the bishop, by the consent, and in presence of the person who holds it; and this shews that the abuse was general.

Not that there were laws wanting for the reflitution of the church lands. The pope having reprimanded the bishops for their neglect in regard to the re-establishment of the monasteries, they wrote to Charles the Bald that they were not affected with this reproach, because they were not guilty; and they reminded him of what had been promised, resolved, and decreed in so many national assemblies. Accordingly they quoted nine.

STILL they went on disputing; till the Normans came and made them all agree.

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<sup>\*</sup> Cum confilio & confensu ipsius qui locum retinet.

<sup>+</sup> Law of the Lombards, feet. 44.

<sup>§</sup> Ibid.

<sup>†</sup> Given the 28th year of the reign of Charles the Bald, in the year 868. Baluzius's edition, pag. 2, 3.

Confishum apud Bonoilum, the 16th year of Charles the Bald, in the year 856, Baluzius's edition. pag. 78.

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### CHAP. XIII.

## Establishment of the Tithes.

given the church rather hopes of relief; than effectually relieved her; and as Charles Martel found all the landed estates of the kingdom in the hands of the clergy, Charlemain found all the church lands in the hands of the foldiery. The latter could not be compelled to restore a voluntary donation; and the circumstances of that time rendered the thing still more impracticable than it seemed to be of its own nature. On the other hand, christianity ought not to have been lost for want of ministers \*, churches, and instruction.

This was the reason of Charlemain's establishing, the tithes, a new kind of property, which had this advantage in savour of the clergy, that as they were given particularly to the church, it was easier in process of time to know when they were usurped.

Some have attempted to make this establishment of an earlier date; but the authorities they produce seem rather, I think, to prove the contrary. The constitution of Clotharius of says only

<sup>♦</sup> In the civil wars which broke out at the time of Charles Martel, the lands belonging to the Church of Rheims were given away to laymen; the clergy were left to fift as well as they could, fays the life of Remigius, Surius, tom, i. p. 279.

<sup>+</sup> Law of the Lombards, book 3. tit. 3. fest. 1 and 2.

book, and which is to be found in Baluzius's edition of the capitulasies, tom. i. art. 11. p. 9.

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that they shall not raise certain & tithes on church lands: so far then was the church from exacting tithes at that time, that its whole pretension was to be exempted from paying them. The second council, of Macon, which was held in 585, and ordains the payment of tithes, says indeed that they were paid in ancient times; but it likewise says, that the custom of paying them was then a bolished.

No one doubts but that the clergy opened the bible before Charlemain's time, and preached the gifts and offerings of the Leviticus. But I dare fay, that before that prince's reign, though the tithes might have been preached up, they were never established.

I TOOK notice that the regulations made under king Pepin had subjected those who were seized of church-lands in fief, to the payment of tithes, and to the repairing of the churches. It was a great point to oblige by a law, whose equity could not be disputed, the principal men of the nation to see the example.

CHARLEMAIN did more; and we find by the capitulary \* de Villis, that he obliged his own de-

<sup>\$</sup> Agraria & passuaria vel decimas porcorum ecclesia soncedimus, ita.

aut alter aut decimator in robus ecclesia sullus accedat. The capitulary
of Charlemain in the year 800. Baluzius's edition, p. 336. explains
extremely well what is meant by that fort of tithe from which the
church is exempted by Clotharius; it was the tithe of the swine which
were put into the king's forests to fatten; and Charlemain enjoins his
judges to pay it, as well as other people, in order to set an example tit is evident, that this was a right of seigniory or ecconomy.

<sup>&</sup>gt;- Canone 5. ex tomo 1, conciliorum antiquorum Gallie, opera Jacobs. Armundi.

Art. 6: Baluzius's edition, p. 332, it was given in the year:

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mesnes to the payment of the tithes: this was stille

But the commonalty are feldom influenced by example to facrifice their interests. The synod of Frankfort surnished them with a more cogent motive to pay the tithes. A capitulary was made in that synod, wherein it is said, that in the last famine the spikes of corn were found to contain no seed, the infernal spirits having devoured it all, and that those spirits had been heard to reproach them with not having paid the tithes; in consequence of which it was ordained that all those who were seized of church-lands, should pay the tithes; and the next consequence was that the obligation extended to all.

CHARLEMAIN'S project did not fucceed at first; for it seemed too heavy a burden †. The payment of the tithes among the Jews was connected with the plan of the foundation of their republic; but here it was a burden quite independent of the other charges of the establishment of the monarchy. We find by the regulations added to the law of the Lombards the difficulty there was in eausing the tithes to be accepted by the civil laws; and as for the opposition they met with before they were admitted by the ecclesiance laws, we may

Held under Charlemain, in the year 794.

<sup>\*</sup> Experimento enim didicimus in anno quo illa valida sames irrepsit, ebullire vacuas annonas a damonibus devoratas, & voces exprobrationis auditas, &c. Balunius's edition, p. 267. art. 23.

<sup>+</sup> See amongst the rest the capitulary of Lewis the Pious, in the year \$29. Baluzius's edition, p. 663. against those who to avoid paying the tithes neglected to cultivate the lands, &cc. art. 5: Nonisquidem & decimis, unde & genitor noster et nos frequenter in diversus placitis admonitionem secimus.

<sup>-</sup> Among others, that of Lotharius, book 3. tit. 3. chap. 6.

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easily judge of it from the different canons of the councils.

THE people consented at length to pay the tithes, upon condition that they might have a power of redeeming them. This the constitution of Lewis the Pious §, and that of the emperor Lotharius his fon, would not allow.

THE laws of Charlemain, with respect to the establishment of tithes, were a work of necessity, not of superstition; a work, in short, in which reli-

gion only was concerned.

His famous division of the tithes into four parts, for the repairing of the churches, for the poor, for the bishop, and for the clergy, manifestly proves that he wanted to restore the church to that fixt and permanent state of which she had been divested.

His will \* shews that he was desirous of repairing the mischief done by his grandsather Charles Martel. He made three equal shares of his moveable goods; two of these he would have divided each into one-and-twenty parts, for the one-and-twenty metropolitan churches of his empire; each part was to be subdivided between the metropolitan, and the suffragan bishops. The remaining third he distributed into four parts, one he gave to his children and grand-children, another was added to the two thirds already bequeathed, and the other two were assigned to charitable uses. It seems as if he regarded the immense donation he was mak-

<sup>§</sup> In the year 859, art. 7. in Baluzius, tom. 1. p. 663.

In the law of the Lombards, book 3, tit. 3. fect. 8.

<sup>\*</sup> It is a kind of codicil produced by Eginhard, and different from the will itself, which we find in Goldastus and Baluzius.

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ing to the church, less as a religious act, than as a political distribution.

#### CHAP. XIII:

Of the Elections of Bisbops and Abbots.

A S the church was grown poor, theckings refigued the right of † nominating to bishop rics and other ecclesiastic benefices. The princes gave themselves less trouble about the ecclesiastic ministers; and the cadidates were less sollicitous in applying to their authority. Thus the church received a kind of compensation for the possessions she had lost.

HENCE if Lewis the Pious -- left the people of Rome in possession of the right of chusing their popes, it was owing to the general spirit that prevailed in his time: he behaved in the same manner to the see of Rome as to other bishoprics.

#### CHAP. XIV.

## Of the Fiefs of Charles Martel.

Shall not pretend to determine whether Charles
Martel in giving the church-lands in fief, made
a grant of them for life or in perpetuity. All I
know is, that under Charlemain \*, and Lotharius

<sup>†</sup> See the capitulary of Charlemain in the year 803. art. 12. Bu litzius's edicion, p. 379. and the edict of Lewis the Pious, in the year 834, in Goldaft. Conflit. Imperial, tom. 2.

This is mentioned in the famous canon, ego Ludovicus, which sa palpable forgery; it is in Baluzius's edition, p. 592. in the year 869:

As appears by his capitulary in the year 800. art. 17, in Bale-

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I. + there were possessions of that kind which defcended to the next heirs, and were divided amongst them.

I FIND moreover that one part of them + was

given as allodia, and the other as fiefs.

I TOOK notice that the proprietors of the allodia were subject to the fervice all the same as the possessors of the fiefs. This undoubtedly was partly the reason that Charles Martel made grants of allodial lands, as well as of fiefs.

#### CHAP. XV.

## Continuation of the fame Subject.

T must be observed, that the fiels having been changed into church-lands, and these again into fiefs, they borrowed fomething of each other. Thus the church-lands had the privilege of fiefs, and these had the privilege of church-lands. Such were the honorary rights of churches, which began at that time. And as those rights have always been annexed to the judiciary power, in preference to what is still called the fief, it follows that

A See his constitutions, inserted in the code of the Lombards, book 3. tit. 1. fect. 44.

+ See the above constitution, and the capitulary of Charles the Bald, in the year 846. chap. 20. in Villa Sparnaco. Baluzius's edition, tom. 2. p. gr. and that of the year 853. chap. 3 and 5. in the fynod of Soiffons, Baluzius's edition, tom. 2. p. 54. and that of the year 854. apud Attiniacum, chap. 10. Baluzius's edition, tom. 2, p. 700 See also the first capitulary of Charlemain, incerti anni, art, 49 and 56. Baluzius's edition, tom. z. p. 519.

+ See the capitularies, book 3. art. 44. and the edict of Piftes in the year 869, art. 8 and 9, where we find the honorary rights of the lords established, in the same manner as they are at this very day.

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the patrimonial jurisdictions were established at the fame time with those very rights.

#### CHAP. XVI.

Confusion of the Royalty and Mayoralty. The fe-

THE connection of my subject has made me invert the order of time, so as to speak of Charlemain before I had mentioned the samous epocha of the translation of the crown to the Carlovingians under king Pepin: a revolution which, contrary to the nature of ordinary events, is more remarked perhaps in our days than when it happened.

THE kings had no authority; they had only an empty name. The regal title was hereditary, and that of mayor elective. Though it was latterly in the power of the mayors to place any of the Mercvingians on the throne, they had not yet taken a king of another race; and the ancient law which fixed the crown in a particular family, was not yet erased out of the heart of the Franks. The king's person was almost unknown in the monarchy; but the royalty was established. Pepin, son of Charles Martel, thought it would be proper to confound those two titles, a consusion which would make it uncertain whether the new royalty was hereditary or not; and this was fufficient for him, who to the regal dignity had joined a great power. The mayor's authority was then blended with that of the king. In the mixture of these two authorities a kind of reconciliation was made; the mayor had been elective, and the king hereditary: the

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crown at the beginning of the fecond race was elective, because the people chose; it was hereditary, because they always chose in the same samily .

FATHER le Cointe, in opposition to the authority of all ancient records †, denies \* that the pope authorised this great change; and one of his reasons is, that he would have committed an injustice. A noble thing to see an historian judge of facts from the circumstances of duty! at this rate we should have no history at all.

BE that as it may, it is very certain that immediately after duke Pepin's victory, the Merovingians ceased to be the reigning family. When his grandson Pepin was crowned king, it was only a ceremony the more, and a phantom the less; he acquired nothing thereby but the royal ornaments, there was no change made in the nation.

This I have faid in order to fix the moment of the revolution, that we may not be mistaken in looking upon that as a revolution which was only a consequence of it.

WHEN Hugh Capet was crowned king at the commencement of the third race, there was a much greater change, because the kingdom passed from a state of anarchy to some kind of government; but when Pepin ascended the throne, there was on-

<sup>\*</sup> See the will of Charlemain, and the division which Lewis the Pious made to his children in the assembly of the states held at Quierzy, produced by Goldost, quem populus eligere velit, ut patri suo succedat in regni hereditate.

<sup>†</sup> The anonymous chron. in the year 752, and Chronic, Centul. in the year 754.

<sup>•</sup> Fabella que post Pippini mortem excogitata est, equitati ac sanctitati Zacharia papa plurimum adversatur. • • Ecclesiastic annals of the French, tom. 2 p. 319.

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ly a transition from one government to another of the same nature.

WHEN Pepin was crowned king, there was only a change of name: but when Hugh Capet was crowned, there was a change in the nature of the thing, because by uniting a great fief to the crown, the anarchy ceased.

WHEN Pepin was crowned, the title of king was united to the highest office; when Hugh Capet was crowned, it was annexed to the greatest fief.

#### CHAP. XVII.

A particular Circumstance in 'the election of the Kings of the fecond race.

E find by the formulary of Pepin's coronation, that Charles and Carloman were likewise anointed; and that the French nobility bound themselves, on pain of interdiction and excommunication, never to chuse a prince of another family.

IT appears by the wills of Charlemain and Lewis the Pious, that the Franks made a choice among the king's children; which agrees with the above-mentioned clause. And when the empire was transferred from Charlemain's family, the election, which before had been conditional, became simple and absolute; so that the ancient constitution was changed.

<sup>♦</sup> Vol. 5th of the historians of France by the Benedictins, p. 9.

—— Us nunquam de alterius lumbis regem in avo prasumant eligere, sed ex spseum. Vol. 5th of the historians of France, p. 10.

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PEPIN perceiving himfelf near his end, affembled + the lords both temporal and spiritual at St. Denis, and divided his kingdom between his two fons. Charles and Carloman. We have not the acts of this affembly; but we find what was there transacted, in the author of the ancient historical collection, published by Canifius, and in + the writer of the annals of Metz, according to \* the observation: of Baluzius. Here I meet with two things in force respect contradictory; that he made this division with the confent of the nobility, and afterwards that he made it by his paternal authority. This proves what I have faid, that the people's right in the fecond race was to chuse in the same family; it was, properly fpeaking, rather a right of exclusion, than that of election.

This kind of elective right is confirmed by the records of the fecond race. Such is this capitulary of the division of the empire made by Charlemain among his three children, in which after fettling their shares, he says , "That if one of the "three brothers happens to have a son, such as the "people shall be willing to chuse as a fit person to "succeed to his father's kingdom, his uncles shall "consent to it."

This same regulation is to be met with in the partition † which Lewis the Pious made among his three children, Pepin, Lewis, and Charles, in the year 837, at the affembly of Aix la Chapelle:

+ Tom. 2. lectionis antiquæ.

\* Edition of the capitularies, tom. 1. p. 188.

<sup>†</sup> In the year 768.

In the first capitulary of the year 806. Baluzius's edition, p. 439. art. 5.

<sup>†</sup> In Goldast. Imperial. Constitut. tom. 2. p. 19.

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and also in another partition, made twenty years before by the same emperor, in favour of Lotharius, Pepin, and Lewis. We may also see the oath which Lewis the Stammerer took at Compeigne, at his coronation. "I.Lewis, by the divine mercy, and the people's election \*appointed king, do or promise . . . . " What I say is confirmed by the acts of the council of Valence - held in the year Soo, for the election of Lewis fon of Boson to the kingdom of Arles. Lewis was there elected, and the chief reason they give for chusing him is, that he was of the imperial family 6, that Charles the Fat had conferred upon him the dignity of king, and that the emperor Arnold had invested him by the scepter, and by the ministry of his ambassadors. The kingdom of Arles, like the other difmembered or dependent kingdoms of Charlemain, was elective and hereditary.

#### CHAP. XVIII.

#### CHARLEMAIN.

Harlemain's attention was to restrain the pow-A er of the nobility within proper bounds, and to hinder them from oppressing the freemen and the clergy. He balanced the feveral orders of the state, and remained perfect mafter of them all. whole was united by the strength of his genius. He

<sup>---</sup> Baluzius's edition, p. 574. art. 14. Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos potestas ipsa dividatur, sed potias populus pariter conveniens, unum ex eis quem dominus voluerit eligat, & bunc fenior frater in loco fratris & filii fufcipiat.

<sup>\*</sup> Capitulary of the year 877. Baluzius's edition, p. 272.

<sup>-</sup> In father Labbe's councils, tom, 9. col 424. and in Dumont's Corp. Diplomati. tom. 1. art. 36.

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led the nobility continually from one expedition to another; giving them no time to form conspiracies, but employing them entirely in the execution of his defigns. The empire was supported by the greatness of its chief: the prince was great, but the man was greater. The king's children were his first subjects, the instruments of his power, and patterns of obedience. He made excellent regulations; and what was still more admirable, he took care to fee them executed. His genius diffused itself through all parts of the empire. We find in this prince's laws a spirit of forecast and fagacity that comprizes every thing, and a certain force that appears irrefiftible. All pretexts of for evading the peformance of duties are removed, neglects are corrected, abuses reformed or prevented. He knew how to punish, but he understood much better how to pardon. He was great in his defigns, and fimple in the execution of them. prince ever possessed in a higher degree the art of performing the greatest things with ease, and the most difficult with expedition. He was constantly visiting the several parts of his extensive empire, and made them feel the weight of his hand wherever he fell. New difficulties fprung up on every fide, and on every fide he removed them. Never prince had more resolution in facing dangers; never prince knew better how to avoid them. He mocked all manner of dangers, and particularly those to which great conquerors are commonly subject, namely conspiracies. This surprising prince was extremely moderate, of a very mild

See his third capitulary of the year 811. p. 146, art. 1, 2, 3, 4, 5, 6, 7 and 8. and the first capitulary of the year 812. p. 490. art. 1. and the capitulary of the year 812. p. 494 art. 9 and 11.

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character, plain and simple in his behaviour. He loved to converse freely with the lords of his court. He indulged perhaps too much his passion for the fair-fex; a failing which however in a prince who always governed by himfelf, and who fpent his life in a continual ferious of toils, may ment fome allow-He was wonderfully exact in his expences; administering his demesnes with prudence, attention, and economy. A father might learn from his laws how to govern his family; and we find in his capitularies the pure and facred fource from whence he derived his riches. I shall add only one word more: he-gave orders that + the eggs on the bartons on his demelnes and the fuperfluous garden stuff should be fold; a most surprising œconomy in a prince, who had distributed among his people all the riches of the Lombards, and the immense treasures of those Huns that had plundered the whole world.

#### CHAP. XIX.

Continuation of the Same Subject.

HIS great prince was afraid left these whom he intrusted in distant parts with the command, should be inclined to revolt; and thought he should find more docility among the clergy. For this reason he erected a vast number of bishoprics in Germany §, and endowed them with very

A See the capitulary de Villis, in the year 800. his fecond capitulary of the year 813. art. 6 and 19. and the 5th book of the capitulatics, art. 303.

† Capitul. de Villis, art, 39. See this whole capitulary, which is a matter-piece of prudence, good administration, and deconomy.

§ See among others the foundation of the archbishopric of Bremen in the capitulary of the year 789, Baluzius's edition, p. 2455. XI.

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large fiefs. It appears by some charters that the clauses containing the prerogatives of these fiefs, were not different from such as were commonly inserted in those grants +; though at present we find the principal ecclesiastics of Germany invested with a sovereign power. Be that as it may, these were some of the contrivances he used against the Saxons. That which he could not expect from the indolence and supineness of a vassal, he thought he might promise himself from the sedulous attention of a bishop. Besides, a vassal of that kind, far from making use of the conquered people against him, would rather stand in need of his assistance to support himself against his people.

### CHAP: XX.

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Lewis THE Plous.

HEN Augustus Cæsar was in Egypt, he ordered Alexander's tomb to be opened; and upon their asking him whether he was willing they should open the tombs of the Ptolemy's, he replied, that he wanted to see the king, and not the dead. Thus, in the history of the second race, we are continually looking for Pepin and Charlemain; we want to see the kings, and not the dead.

A PRINCE, who was the sport of his passions, and a dupe even to his virtues; a prince who never understood rightly either his own strength or weakness; a prince who was incapable of making

<sup>†</sup> For instance the prohibition to the king's judges against entering upon the territory to demand the freds, and other duties. I have said a good deal concerning this in the preceding book.

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himself either feared or beloved; a prince in short, who with few vices in his heart, had all manner of defects in his understanding, took the reins of the empire into his hands which had been held by Charlemain.

Ar a time when the whole world is in tears for the death of his father, at a time of surprize and alarm, when the subjects of that large empire all call upon Charles, who is no more; at a time when he is advancing with all expedition to take possession of his father's throne, he sends some trusty officers before him, in order to seize the persons of those who had contributed to the irregularity of his sisters. This step was productive of the most staal catastrophes \*. It was imprudent and precipitate. He began with punishing domestic crimes, before he reached the palace; and with alienating the minds of his subjects, before he ascended the throne.

His nephew, Bernard king of Italy, being come to implore his clemency, he ordered his eyes to be put out, which proved the cause of that prince's death a sew days after, and created Lewis a great many enemies. His apprehension of the consequence induced him to shut his brothers up in a monastry; by which means the number of his enemies angmented. These two last transactions were afterwards laid to his charge in a judicial manner +, and his accusers did not fail to tell him, that he had violated his oath, and the solemn promises

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<sup>.</sup> The anonymous author of the life of Lewis the Pious in Duchefne's collection, tom. 2. p. 295.

<sup>+</sup> See his trial and the circumstances of his deposition, in Duchesne's collection, tom. 2. p. 133,

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which he had made to his father on the day of his coronation.

AFTER the death of the empress Hermengardis, by whom he had three children, he married Judith, and had a son by that princess; but soon mixing all the indulgence of an old husband with all the weakness of an old king, he flung his family into disorder, which was followed with the downfal of the monarchy.

He was continually altering the partitions he had made among his children. And yet these partitions had been consirmed each in their turn by his own outh, and by those of his children and the nobility. This was as if he wanted to try the sidelity of his subjects; it was endeavouring by confusion, scruples, and equivocations, to puzzle their obedience; it was consounding the different rights of those princes, and rendering their titles dubious, especially at a time when there were but sew fortresses, and when the principal bulwark of authority was the fealty sworn and accepted.

The emperor's children, in order to preserve their shares, courted the clergy, and granted them privileges till then unheard. These privileges were specious; and the clergy in return were made to warrant the revolution in favour of those princes. Agobard \* represents to Lewis the Pious, his having sent Lotharius to Rome, in order to have him declared emperor; and that he had made a division of his dominions among his children, after having consulted heaven by three days fasting and praying. What defence could such a weak prince make against the attack of superstition? It is easy to per-

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have twice received from his imprisonment, and from his public penance; they would fain degrade the king, and they degraded the regal dignity.

WE find a difficulty at first to conceive how a prince who was possessed of several good qualities, who had some knowledge, who had a natural disposition to virtue, and who, in short, was the son of Charlemain, could have such a number of enemies +, so impetuous and implacable as even to insult him in his humiliation, and to be determined upon his ruin: and indeed they would have utterly completed it, is his children, who in the main were more honest than they, had been steady in their design, and could have agreed amongst themselves.

## CHAP. XXI.

Continuation of the same Subject.

dom was indebted to Charlemain, still subfisted under Lewis the Pious in such a degree as enabled the state to support its grandeur, and to command respect from foreign nations. The prince's understanding was weak, but the nation was warlike. His authority declined at home, though there seemed to be no diminution of power abroad.

CHARLES Martel, Pepin, and Charlemain were in fuccession rulers of the monarchy. The first stat-

<sup>†</sup> See his trial and the circumstances of his deposition, in Duchefne's collection, tom, 2. p. 331. See also his life written by Tegan: Tanto enim odio laborabat, ut tederet eos vita ipsius, says this anonymous author in Duchesne's collection, tom, 2, p. 307.

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tered the avarice of the foldiers; the other two that

In the French constitution, the whole power of the state was lodged in the hands of the king, the nobility, and clergy. Charles Martel, Pepin, and Charlemain, joined fometimes their interest with : one of those parties to check the other, and generally with both; but Lewis the Pious could gain the affection of neither. He disobliged the bishops by publishing regulations which had the air of feverity, because he carried things to a greatery length than was agreeable to their inclination: Very good laws may be ill-timed. The bishops in those days being accustomed to take the field against the Saracens +, and the Saxons, had very litthe of the spirit of religion. On the other hand, as he had no longer any confidence in the nobility, he promoted mean people, turning the nobles out of their employments at court ---, to make room for strangers and upstarts. By these means the affections of the two great bodies of the nobility and clergy were alienated from their prince, the confequence of which was a total defertion.

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Tegen fays that what feldom happened under Charlemain was a common practice under Lewis.

Being defirous to check the pobility, he promoted one Bernardto the place of chamberlain, by which the great lords were enapperated a to the highest pitch.

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## Continuation of the Same Subject.

BUT what chiefly contributed to weaken the monarchy, was the extravagance of this prince in alienating the crown demesnes \*. And here it is that we ought to listen to the account of Nitard, one of our most judicious historians, a grandson of Charlemain, strongly attached to Lewis the Pious, and who wrote his history by order of Charles the Bald.

He fays, "that one Adelhard for some time gained such an ascendant over the emperor, that this prince conformed to his will in every thing; that at the instigation of this favourite, he had granted the crown lands + to every body that asked them, by which means the state was ruined." Thus he did the same mischief throughout the empire, as I observed he had done in Aquitaine; the former Charlemain redressed; but the latter was past all remedy.

THE state was reduced to the same debility in which Charles Martel found it upon his accession to the mayoralty; and so desperate were its circumstances, that no exertion of authority was any longer capable of faving it.

Villas regias que erant sui & avi & tritavi, sidelibus suis tradidit eas in possessiones sempiternas: secit enim boc diu tempore. Tegan de Gessis Ludovici Pii.

<sup>+</sup> Hinc libertates, binc publica in propriis usibus distribuere sunstr. Nitard, lib. 4. prope finem.

S Rempublicam penitus annullavit. Ibid.

See book xxx, chap, 13.

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THE treasury was so exhausted, that in the reign of Charles the Bald, no one could continue † in his employments, nor be safe in his person, without paying for it. When they had it in their power to destroy the Normans \*, they took money to let them escape: and the first advice which Hinemar gives to Lewis the Stammerer, is to ask of the assembly of the nation, a sufficient allowance to destray the expences of his houshold.

# CHAP. XXIII.

Continuation of the fame Subject ...

THE clergy had reason to repent the protection on they had granted to the children of Lewis the Pious. This prince, as I have already observed, had never given § any of the church-lands by precepts to the laity; but it was not long before Lotharius in Italy, and Pepin in Aquitaine, quitted Charlemain's plan, and resumed that of Charles Martel. The clergy had recourse to the emperor against his children, but they themselves had weakened the authority to which they appealed. In Aquitaine some condescension was shewn, but none in Italy.

THE civil wars with which the life of Lewis the Pious had been embroiled, were the feed of those which followed his death. The three brothers, Lotharius, Lewis, and Charles, endeavoured each

<sup>+</sup> Hinemar, letter 1, to Lewis the Stammerer

<sup>\*</sup> See the fragment of the chronicle of the monastery of S. Sergius in Angers, in Duckesne, tom. 2. p. 40.

<sup>5</sup> See what the bishops say in the synod of the year 845, and Ten-

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to bring over the nobility to their party. To fuch as were willing therefore to follow them they granted church-lands by precepts; fo that to gain the nobility, they facrificed the clergy? and a tree too

WE find in the capitularies , that those princes were obliged to yield to the importunity of demands, and that what they would not often have freely granted, was extorted from them: we find that the clergy thought themselves more oppressed by the nobility than by the kings. It appears that Charles the Bald + became the greatest enemy of the patrimony of the clergy, whether he was most incensed against them for having degraded his father on their account, or whether he was the most timorous. Be that as it may, we meet with & continual o that this read of thewis

See the fynod in the year 845, apud Teudonis villam, art. 3 & 4. which gives a very exact description of things; as also, that of the fame year, held at the palace of Vernes, art. 12. and the fynod of Beauvais also in the same year, art. 3, 4, and 6. and the capitulary in Ville Sparmaco, in the year 846. art. 20. and the letter which the bithops affembled at Rheims wrote in 8'58, to Lewis king of Germany, art. 8. only bein by blander abore if the eron's

<sup>+</sup> See the capitulary in Villa Spannaco, in the year 846. The nobility had fet the king against the bishops, insomuch that he expelled them from the affembly; a few of the canons enacted in council were sicked out, and the prelates were told that these were the only ones which should be observed; nothing was granted them that could be refused. See art. 20, 21, and 22. See also the letter which the bishops affembled at Rheims wrote in the year 858, to Lewis king of Germany, and the edict of Pilles, in the year 864, art. 5.

<sup>§</sup> See this very capitolary in the year 846, in Villa Sparnaco. Ekowife the capitulary of the affembly held apud Marsnam, in the year 847. art. 4. wherein the clergy reduced themselves to demand only the restitution of what they had been possessed of under Lewis the Pious. See also the capitulary of the year 851. apud Marsnom, art. 6 & 7. which confirms the nobility and clergy in their several possessions, and that apud Bonoilum, in the year 856. which is a remonfrance of the bishops to the king, because the eyils, after so many

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quarrels in the capitularies; between the clergy who demanded their estates, and the nebility who refused or deferred to restore them; and the kings acting as mediators.

THE fituation of affairs at that time is a spectacle : really deserving of pity. While Lewis the Pious. made immense donations out of his demesnes to the clergy; his children distributed the churchlands among the laity. The fame prince with one hand enriched, and with another oftentimes stripped the clergy. The latter had no fixt state; one moment they were plundered, another they received fatisfaction: but the crown was always loling and the line that have no Dark and W. J. at

Towards the close of the reign of Charles the Bald, and from that time forward, there was an end of the disputes of the clergy and laity, concerning the restitution of church-lands. The bishops indeed breathed out still a few fighs in their remonstrances to Charles the Bald, which we find in the capitulary of the year 856, and in the letter they wrote to Lewis king of Germany, in the year 858: but they proposed things, and challenged promifes, fo often eluded, that we plainly fee they had no longer any hopes of obtaining their defire.

ALL that could be expected then, was to repair in general the injuries done both to church and flate. The kings engaged not to deprive the nobility of their freemen, and not to give away a-

laws, had not been redreffed; and, in fine, the letter which the bishops assembled at Rheims wrote in the year 858. to Lewis king of Germany, art. 8.

<sup>+</sup> See the capitulary of the year 852, art. 6 & 7.

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ny more church-lands by precepts ; so that the interests of the clergy and nobility seemed then to be united.

THE dreadful depredations of the Normans, as I have already observed, contributed greatly to put an end to those quarrels.

THE authority of our kings lessening daily, both for the reasons already given, and those which I shall mention hereaster, they imagined they had no better resource lest, than to resign themselves into the hands of the clergy. But the ecclesiastics had weakened the power of the kings, and these had diminished the influence of the ecclesiastics.

In vain did Charles the Bald and his successors call in the church to support the state, and to prevent its ruin; in vain did they avail themselves of the \* respect which the commonalty had for that body, to maintain that which they should also have for their prince; in vain did they endeavour † to give an authority to their laws by that of the canons; in vain did they join the ecclesiastic § with

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<sup>+</sup> See the capitulary of Charles the Bald de Carifiaco, in the year \$57. Baluzius's edition; tom, ii. p. \$1. feft. 1, 2, 4, & 7.

<sup>5</sup> See the fynod of Piftes in the year 802, art. 4. and the capituhary of Lewis II. apad Vernis palatium, in the year 883, art. 4, & 5

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the civil punishments; in vain to counterbalance the authority of the count \* did they give to each bishop the title of their commissary in the several provinces: it was impossible for the clergy to repair the mischief they had done; and a terrible missortune, which I shall presently mention, proved the ruin of the monarchy.

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Said that the freemen were led against the enemy by their count, and the vassals by their lord. This was the reason that the several orders of the state balanced each other; and though the king's vassals had other vassals under them, yet they might be over-awed by the count, who was at the head of all the freemen of the monarchy.

THE freemen \* were not permitted at first todo homage for a fief; but in process of time this
was allowed: and I find that this change was made
during the period that elapsed from the reign of
Gontram to that of Charlemain. This I prove by
the comparison which may be drawn between the
treaty of Andely +, signed by Gontram, Childebert, and queen Brunechild, and the \* partition

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<sup>\*</sup> Capitulary of the year 876. under Charles the Bald, in Synodo Pontigonensis. Baluzius's edition, art. 12.

See what has been faid already, book xxx. last chapter towards the end.

<sup>+</sup> In the year 587. in Gregory of Tours, book 9.

See the following chapter, where I shall speak more diffusively of those partitions; and the notes in which they are quoted.

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<sup>1</sup> See the capitulary of Charles the Bald de Carifiaco, in the year 857. Baluzius's edition; tom, ii. p. 81. felt. 1, 2, 4, & 7, 11

<sup>5</sup> See the fynod of Piftes in the year 802, art. 4. and the capituhry of Lewis II. apad Vernis palatium, in the year 883, art. 4. & 5

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made by Charlemain amongst his children, as well as a like partition by Lewis the Pious. These three acts contain nearly the same regulations, with respect to the vassals; and as they determine the very same points, under almost the same circumstances, the spirit as well as the letter of those three treaties in this respect are very much alike.

But as to what concerns the freemen, there is a capital difference. The treaty of Andely does not fay that they might do homage for a fief; whereas we find in the divisions of Charlemain and Lewis the Pious express clauses to empower them to do homage. This shews that a new usage had been introduced after the treaty of Andely, whereby the freemen were become capable of this great privilege.

This must have happened when Charles Martel, after distributing the church-lands to his foldiers, partly in fief, and partly as allodia, made a kind of revolution in the feudal laws. Tis very probable that the nobility who already had fiefs, found a greater advantage in receiving the new grants as allodia; and that the freemen thought themselves happy in accepting them as siefs.

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The chief cause of the humiliation of the second race.

## Changes in the Allodia.

oned in the preceding chapter, ordained, that after his death, the vaffals belonging to each king should be permitted to receive benefices in their own sovereign's dominion, and not in those of another; whereas they + might keep their allodial estates in any of their dominions. But he adds so that every freeman might, after the death of his lord, do homage in any of the three kingdoms to whom he pleased, as well as he that never had been subject to a lord. We find the same regulations in the partition which Lewis the Pious made among his children in the year 817.

But though the freemen had done homage for a fief, yet the count's militia was not thereby weakened: the freeman was still obliged to contribute for his allodium, and to get people ready for the fervice belonging to it, at the proportion of one man

<sup>♦</sup> In the year 806, between Charles, Pepin and Lewis; it is quoted by Goldaft, and by Baluzius, tom. r. p. 439.

Art. 9. pag. 443. which is agreeable to the treaty of Andely in Gregory of Tours, book ix.

<sup>+</sup> Art. i o. and there is no mention made of this in the treaty of Andely.

<sup>§</sup> In Baluzius, tom: 1. p. 574. Licentiam babeat unusquisque liber bomo qui seniorem non babuerit, cuicumque ex his tribus fratribus veluerit, se commendandi, art. 9. See also the division made by the same emperor in the year 837. art. 6. Baluzius's edition, pag. 686.

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to four manors; or else to procure a man that should do the duty of the sief in his stead. And when some abuses had been introduced upon this head, they were redressed, as appears by the constitutions of Charlemain, and by that \* of Pepin king of Italy, which explain each other.

THE remark made by historians, that the battle of Fontenay was the destruction of the monarchy, is very true: but I beg leave to cast an eye on the unhappy consequences of that day.

Some time after that battle, the three brothers, Lotharius, Lewis and Charles, made a treaty t, wherein I find some clauses which must have altered the whole political system of the French government.

In the declaration , which Charles made to the people, of that part of the treaty relating to them, he says, that \* every freeman might chuse whom he pleased for his lord, whether the king or any of the nobility. Before this treaty the freeman might do homage for a sief; but his allodium still continued under the immediate power of the king, that is, under the count's jurisdiction; and he depend-

<sup>4</sup> In the year 811. Baluzius's edition, torn. 1. p. 486. art. 7. and 8. and that of the year 812. ibid. pag. 390. art. 1. Ut omnis liber bome qui quatuor manses vestitos de proprio suo, sive de alicajus beneficio, habet, ipse se praparet, & ipse in bostem pergat sive cum seniore suo, &c. See likewise the capitulary of the year 807. Baluzius's edition, tom. 1. pag. 458.

<sup>\*</sup> In the year 293. inferted in the law of the Lombards, book 3. tit. 9. chap. 9.

<sup>+</sup> In the year \$47. quoted by Aubert Le Mire, and Baluzius, som. ii. p. 42. Conventus apud Marsnam.

Administration of the land and a contract of the

<sup>.</sup> Ut unusquisque liber home in nostre regne seniorem quem noturit in nobis & in nostris fidelibus accipiat, art. 2. of the Declaration of Charles.

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ed on the lord to whom he vowed fealty, only on account of the fief which he had obtained. After that treaty, every freeman had a right to subject his allodium to the king, or to any other lord, as he thought proper. The question is not in respect to those who put themselves under the protection of another for a fief, but to such as changed their allodial into a seudal land, and withdrew themselves, as it were, from the civil jurisdiction, to enter under the power of the king, or of the lord whom they thought proper to chuse.

Thrus it was that those who formerly were only under the king's power, as freemen under the count, became insensibly vasfals one of another, since every freeman might chuse whom he pleased for his lord, the king, or any of the nobility.

2. It a man changed an estate, which he posfessed in perpetuity, into a sief, this new sief could no longer be only for life. Hence we see, a short time after, a + general law for giving the siefs to the children of the present possessor: it was made by Charles the Bald, one of the three contracting princes.

WHAT has been faid with regard to the liberty every freeman had in the monarchy, after the treaty of the three brothers, of chusing whom he pleafed for his lord, the king or any of the nobility, is confirmed by the acts subsequent to that time.

In the reign of Charlemain, when the vallal!

<sup>†</sup> Capitulary of the year 877. tit. 53. art. p. and so, apud Casifiacum, fimiliter & de nostris vasfallis faciendum est, &ce. This capitulary relates to another of the same year, and of the same place, art. 3.

<sup>\*</sup> Capitulary of Aix is Chapelle, in the year 883. art. 16. qued nullus seniorem suum dimittat postquam ab eo acceperit valente sessidum, unum; and the capitulary of Pepin, in the year 783. art. 5.

had received a present of a lord, were it worth only a sol, he could not afterwards quit him. But, under Charles the Bald, the vassals \* might sollow what was agreeable to their interests, or their inclination, with intire safety; and so strongly does this prince explain similarly on this subject, that he seems rather to encourage them in the enjoyment of this liberty, than to restrain it. In Charlemain's time, benefices were rather personal than real; afterwards they became rather real than personal.

#### C HAP. XXVE

Brown Land Comment

Changes in the Fiefs.

THE same changes happened in the siefs, as in the allodia. We find by the capitulary of Compeigne, under king Pepin, that those who had received a benefice from the king, gave a part of this benefice to different bondmen; but these parts were not distinct from the whole. The king revoked them when he revoked the whole; and at the death of the king's vassal, the rear-vassal likewise lost his rear-fief; and a new beneficiary succeeded, who also established new rear-vassals. Thus it was the person, and not the rear-fief, that depended on the fief; on the one hand, the rear-vassal ze-

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In the year 757, art. 6. Baluaius's edition, pag. 1834

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See the capitulary de Carifiaco, in the year \$56. art. 10. and 13. Baluzius's edition, tom. 2. pag. 83. in which the king, together with the lords spiritual and temporal, agreed to this; Et si aliquis de vobis sit cui suus senioratus non placet, & illi simulat ad alium seniorem melius quam ad illum acaptare possit, veniot ad illum, & ipsi, tranquille & pacisico animo donat illi commeatum. . . & quod Deus illi cupierit ad alium seniorem acaptare potuerit, pacisoe habeat.

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turned to the king, because he was not tied for ever to the vassal; and the rear-fief returned likewise to the king, because it was the fief itself, and not a dependance of it.

Such was the tear-wassalage, while the siefs were during pleasure; and such was it also while they were for life. This was altered when the siefs descended to the next heirs, and the rear-siefs the same. That which was held before immediately of the king, was held now mediately; and the regal power was thrown back, as it were, one degree; sometimes two, and frequently more.

WE find in the books \* of fiefs, that though the king's vaffals might give away in fief, that is, in rear-fief to the king, yet these rear-vaffals, or petty vavasors, could not give also in fief; so that whatever they had given, they might always resume. Besides, a grant of that kind did not descend to the children like the siefs, because it was not supposed to have been made according to the seudal laws.

IF we compare the fituation in which the rearvaffalage was at the time when the two Milanele fenators wrote that book, to what it was under king Pepin, we shall find that the rear-fiefs preferved their primitive nature longer than the fiefs.

But when those senators wrote, such general exceptions had been made to this rule, as had almost abolished it. For if a person + who had received a sief of a rear-vassal, happened to sollow him upon an expedition to Rome, he was intitled to all

Maria de la compansión de

<sup>\*</sup> Book s. chap. r,

At least in Italy and Germany.

<sup>+</sup> Book 1. of fiels, chap. 1.

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the privileges of a vassal. In like manner, if he had given money to the rear-vassal to obtain the fief, the latter could not take it from him, nor prevent him from transmitting it to his son, till he returned him his money: in short, this rule † was no longer observed by the senate of Milan.

### CHAP. XXVII.

Another Change which bappened in the Fiefs.

N Charlemain's time & they were obliged, under great penalties, to repair to the general meeting in case of any war whatsoever; they admitted of no excuses, and if the count exempted any one, he was liable himself to be punished. But the treaty of the three brothers I made a reftriction + upon this head, which rescued the nobility, as it were, out of the king's hands; they were no longer obliged to ferve in time of war, but when the war was defensive. In others, they were at liberty to follow their lord, or to mind their own bufiness. This treaty relates to another \*, concluded five years before, between the two brothers, Charles the Bald and Lewis king of Germany, by which thefe princes release their vassals from ferving them in war, in case they should attempt hostilities against each

<sup>+</sup> Book 1. of fiefs, chap. 1.

<sup>§</sup> Capitulary of the year 802. art. 7. Baluzius's edition, pag. 365.

<sup>9</sup> Apud Marsnam, in the year 847. Baluzius's edition, pag. 42.

<sup>\*</sup> Volumus ut cujuscumque nostrum homo in cujuscumque regno sit, cum senione suo in hastem, vel aliis suis utilitatibus, pergat, nist talis regni invasio quam LAMTUVERI dicunt, quod absit, acciderit, ut omnis populus illius regni ad eam repellendam communiter pergat. art. 5. ibid, pag. 44.

<sup>\*</sup> Apud orgenteratum, in Baluzius, capitularies, tom, 2, pag. 39.

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se edition, page 45.

other; an agreement which the two princes confirmed by oath, and at the same time made their armies swear to it.

THE death of an hundred thousand French, at the battle of Fontenay, made the remains of the nobility imagine, that by the private quarrels of their kings, about their respective shares, their whole body should be exterminated, and that the ambition and jealousy of those princes would end in the ruin of all the best families of the kingdom. A law was therefore passed, that the nobility should not be obliged to serve their princes in war, unless it was to defend the state against a foreign invasion. This law + obtained for several ages.

### CHAP. XXVIII.

Changes which happened in the great Offices, and in the Fiefs.

THE many changes introduced into the fiefs, in particular cases, seemed to spread so wide as to be productive of a general corruption. I took notice, that in the beginning several fiefs had been alienated in perpetuity; but those were particular cases, and the fiefs in general preserved their nature; so that if the crown lost some fiefs, it substituted others in their stead. I also observed, that the crown had never alienated the great offices in perpetuity.

<sup>+</sup> See the law of Guy king of the Romans among those which were added to the Salio law, and to that of the Lombards, tit. 6. sect. 2. in Echard.

Some authors pretend that the county of Toulouse had been given away by Charles Martel, and passed by inheritance down to

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But Charles the Bald made a general regulation, which equally affected the great offices, and the fiefs. He ordained, in his capitularies, that the \* counties should be given to the children of the count, and that this regulation should-likewise take place with regard to the fiefs.

We shall see presently that this regulation received a more considerable extent, insomuch that the great offices and fiels went even to distant relations. From thence it followed, that most of the lords, who before this time had held immediately of the crown, held now only mediately. Those counts who formerly administered justice in the king's placita, and who led the freemen against the enemy, found themselves situated between the king and his freemen; and the king's power was removed farther off another degree.

AGAIN, it appears from the capitularies +, that the counts had benefices annexed to their counties, and vaffals under them. When the counties became hereditary, the count's vaffals were no longer the immediate vaffals of the king; and the benefices annexed to the counties were no longer the king's benefices: the counts grew powerful, because the vaffals, whom they had already under them, enabled them to procure others.

In order to be convinced how much the monar-

Raymond the last count; but if this be true, it was owing to some circumstances, which might have been an inducement to chuse the counts of Toulouse from among the children of the last possessor.

\* See his capitulary of the year 877 tit. \$3. art. 9. and 19. apud Carifiacum; this capitulary is relative to another of the same year and place, art. 3.

The 3d capitulary of the year 812, art. 7. and that of the year 815. art. 6. on the Spaniards. The collection of the capitularies, book 5. art. 223. and the capitulary of the year 869. art. 2, and that of the year 877. art. 13, Baluzius's edition.

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chy was thereby weakened towards the end of the fecond race, we have only to cast an eye on what happened at the commencement of the third, when the multiplicity of rear-fiefs slung the great vassals into despair.

Ir was a custom \* of the kingdom, that when the elder brothers had given shares to their younger brothers, the latter paid homage to the elder; so that those shares were held of the lord paramount only as a rear-sies. Philip Augustus, the duke of Burgundy, the counts of Nevers, Boulogne, S. Paul, Dampierre, and other lords declared †, that hencesorward, whether the sief was divided by succession, or otherwise, the whole should be held always of the same lord, without any intermediation. This ordinance was not generally followed; for, as I have elsewhere observed, it was impossible to make general ordinances at that time; but several of our customs were regulated by them.

# C H A P. XXVIII.

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Of the nature of the Fiefs after the Reign of Charles the Bald.

Thas been already observed, that Charles the Bald ordained, that when the possession of a great office or of a fiel left a son at his death, the office or fiel should devolve to him. It would be a difficult matter to trace the progress of the abuses which from thence resulted, and of the extension

<sup>\*</sup> As appears from Otho of Frilingen, of the actions of Frederic, book 2. chap. 29.

<sup>†</sup> See the ordinance of Philip Augustus in the year 1209. in the new collection.

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given to that law in each country. I find in the books • of fiefs, that towards the beginning of the reign of the emperor Conrad II. the fiefs fituated in his dominions did not descend to the grandchildren: they descended only to one of the last possession of the last possession of the last possessions that the fiefs were given by a kind of election, which the lord made among the children.

In the seventeenth chapter of this book, we have explained in what manner the crown was in some respects elective, and in others hereditary, under the second race. It was hereditary, because the kings were always taken from that samily, and because the children succeeded; it was elective, by reason the people chose from amongst the children. As things of a similar nature move generally alike, and one political law is constantly relative to another, the same spirit was followed; in the succession of siefs, as had been observed in the succession to the crown. Thus the siefs were transmitted to the children by the right of succession, as well as of election; and each sief was become both elective and hereditary, like the crown.

This right of election in the person of the lord, was not subsisting \* at the time of the authors \* of the books of fiels, that is, in the reign of the emperor Frederic I.

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<sup>4</sup> Book z. tit. z.

<sup>\*</sup> Sic progressium est, ut ad filios deveniret in quem Dominus boc veltet beneficium confirmare. Ibid.

<sup>4</sup> At least in Italy and Germany.

<sup>\*</sup> Quod bodie ita stabilitum est, ut ad omnes aqualiter veniat, book 1. of the fiefs, tit. 2.

<sup>\*</sup> Gerardus Niger and Aubertus de Orto.

Continuation of the same Subject.

T is mentioned in the books of fiefs, that when \* the emperor Conrad fer out for Rome, the vaffals in his fervice prefented a petition to him, that he would pleafe to make a law, that the fiefs which descended to the children, should descend also to the grandchildren; and that he whose brother-died without legitimate heirs, might succeed to the fief which had belonged to their common father: This was granted.

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In the same place it is said, (and we are to remember, that those writers + lived at the time of the emperor Frederic I.) " that the ancient civili-" ans & had always been of opinion, that the fuc-" cession of fiefs in a collateral line did not extend " farther than to cousin germans by the father's " fide, though of late it was carried as far as the fe-" venth degree, and by the new code they had ex-" tended it in a direct line in infinitum." It is thus that Conrad's law was infenfibly extended.

ALL these things being supposed, the bare perufal of the hiftory of France is fufficient to demon-

t Cujas has proved it extremely well.

Cum vero Conradus Romam proficisceretur, petitum est a sidelibus qui in jus erant servitio, ut, lege ab eo promulgata, hoc etiam ad nepotes ex filio producere dignaretur, & ut frater fratri fine legitimo-bærede defuncto in beneficio quod eorum patris fuit, succedat, book 1. of fiefs, tit. 1.

<sup>§</sup> Sciendum est quod beneficium advenientes ex latere, ultra fratres patrueles non progreditur successione ab antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in masculis descendentibus novo jure in infinitum extenditur. 1bid.

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flrate, that the perpetuity of fiefs was established earlier in this kingdom than in Germany. To. wards the commencement of the reign of the emperor Conrad II. in 1024, things were upon the fame footing still in Germany, as they had been in France under the reign of Charles the Bald, who died in 877. But such were the changes made in this kingdom after the reign of Charles the Bald, that Charles the Simple found himself unable to dispute with a foreign house his incontestable rights to the empire; and, in fine, that in Hugh Capet's time the reigning family, stripped of all its demesnes, was no longer in a condition to maintain the crown.

THE weak understanding of Charles the Bald produced an equal weakness in the French monarchy. But as his brother Lewis king of Germany, and some of that prince's successors, were men of better parts, their government preserved its vigour much longer.

Bur what do I fay? perhaps the flegmatic constitution and, if I dare use the expression, the immutability of spirit peculiar to the German nation, made a longer stand than the volatile temper of the French, against that disposition of things, which perpetuated the fiefs, by a natural tendency, in families.

BESIDES, the kingdom of Germany was not laid wafte, and annihilated, as it were, like that of France, by that particular kind of war with which it had been harraffed by the Normans and Saracens. There were less riches in Germany, fewer cities to plunder, less extent of coast to scour, more marshes to get over, more forests to penetrate. As the dominions of those princes were less in danger of

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being ravaged and torn to pieces, they had less need of their vaffals, and of course less dependance on them. And in all probability, if the emperors of Germany had not been obliged to be crowned at Rome, and to make continual expeditions into Italy, the fiefs would have preserved their primitive nature much longer in that country.

# CHAP. XXX.

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In what manner the Empire was transferred from the Family of Charlemain.

THE empire, which in prejudice to the branch of Charles the Bald, had been already given to the + baftard line of Lewis king of Germany, was transferred to a foreign house by the election of Conrad, duke of Franconia, in 912. The reigning branch in France being hardly able to dispute a few villages, was much less in a condition to contest the empire. We have an agreement which paffed between Charles the Simple and the emperor. Henry I, who had succeeded to Conrad. It is call led the compact of Bonn +: These two princes. met in a vessel which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent middle term. Charles took the title of king of West France, and Henry that of king of East France. Charles contracted with the king of Germany, and not with the emperor. I when no bair was to make another alode to reflect the drive.

Arnold, and his fon Lewis IV.

<sup>+</sup> In the year 926. quoted by Aubert le Mire, Cod. donationum piarum, chap, 27. the contract of investment

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In what manner the Crown of France was transferred to the House of Hugh Capet.

samound border state leds .. view THE inheritance of the fiefs, and the general establishment of rear-fiefs, extinguished the political, and formed a feudal government. Inflead of that prodigious multitude of vaffals who were formerly under the king, there were now a few only, on whom the others depended. The kings had scarce any longer a direct authority; a power which was to pass through so many and through fuch great powers, either front or was loft before it reached its term. Those great vaffals would no longer obey; and they even made use of their rear-vaffals to withdraw their obedience. The kings deprived of their demelnes, and reduced to the cities of Rheims and Laon, were left exposed to their mercy; the tree stretched out its branches too far, and the head was withered. The kingdon't found itself without a demenne, as the empire is at present. The crown was therefore given to one of the most powerful vasfals. at the powerful vasfals.

THE Normans laid waste the kingdom; they sailed in open boats or small vessels, entered the mouths of rivers, and ravaged the country on both sides. The cities of Orleans and Paris put a stop to those plunderers, so that they could not advance farther, either on the Seine, or on the Loire. Hugh Capet, who was master of those cities, held in his

<sup>•</sup> See the capitulary of Charles the Bald, in the year \$77, apud Carificeum, on the importance of Paris, S. Denis, and the castles on the Loire, in those days.

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hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only perfon able to defend it. It is thus the empire was afterwards given to a family, whose dominions form so strong a barrier against the Turks.

THE empire went from Charlemain's family, at a time when the inheritance of fiefs was established only as a mere condescendence. It even appears that this inheritance obtained much later \* among the Germans than among the French; which was the reason that the empire, considered as a fief, was elective. On the contrary, when the crown of France went from the family of Charlemain, the fiefs were really hereditary in this kingdom; and the crown, as a great fief, was likewise hereditary.

But it is very wrong to refer to the very moment of this revolution, all the changes which happened, either before or afterwards. The whole was reduced to two events; the reigning family changed, and the crown was united to a great fief.

### STREET CHAP. XXXII.

Some Consequences of the Perpetuity of Fiefs.

ROM the perpetuity of fiefs, it followed, that the right of feniority or primogeniture was established among the French. This right was quite unknown under the first race e; the crown was divided among the brothers, the alledia were shared in the same manner, and as the fiefs, whe-

See above, c. xxx.

<sup>•</sup> See the Salie law and the law of the Ripuarians in the title of allodia.

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ther precarious, or for life, were not an object of fuccession, there could be no partition with respect to those tenures.

UNDER the fecond race, the title of emperor which Lewis the Pious enjoyed, and with which he honoured his eldest fon Lotharius, made him think of giving this prince a kind of superiority over his younger brothers. The two kings \* were obliged to wait upon the emperor every year, to earry him presents, and to receive much greater from him; they were likewife to confult with him upon common affairs. This is what inspired Lotharius with those pretences which met with such bad fuccess. When Agobard + wrote in favour of this prince, he alledged the emperor's own regulation, who had affociated Lotharius to the empire, after he had confulted the Almighty by a three days fast, and by the celebration of the holy mysteries; after the nation had fworn allegiance to him. which they could not refuse without perjuring themfelves; and after he had fent Lotharius to Rome to be confirmed by the pope. Upon all this he lays a stress, and not upon his right of primogeniture. He fays, indeed, that the emperor had defigned a partition among the younger brothers, and that he had given the preference to the elder; but faying he had preferred the elder, was faying at the fame time that he might have given the preference to his younger brothers.

But as foon as the fiefs became hereditary, the right of feniority was established in the feudal suc-

<sup>\*</sup> See the capitulary of the year 817, which contains the first partition made by Lewis the Pious among his children.

<sup>†</sup> See his two letters upon this subject, the title of one of which is de divisione imperii.

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cession; and for the same reason in that of the crown, which was the great sief. The ancient law of partitions was no longer subsisting; the siefs being charged with a service, the possessor must have been enabled to discharge it. The right of primogeniture was established, and the reason of the seudal law was superior to that of the political or civil institution.

As the fiefs descended to the children of the postseffor, the lords lost the liberty of disposing of them; and, in order to indemnify themselves, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

THE fiefs were foon rendered transferable to firangers, as a patrimonial effate. This gave rife to the right of fines of alienation, which were effablished almost throughout the kingdom. At first these rights were arbitrary; but when the practice of granting such permissions was become general; they were fixed in every district.

THE right of redemption was to be paid at every change of heir, and at first was paid even in a direct line . The most general custom had fixed it to one year's income. This was burthensome and inconvenient to the vassal, and affected in some measure the fies itself. It was often agreed in the act of homage, that the lord should no longer demand more than a certain sum of money for

<sup>\*</sup> See the ordinance of Philip Augustus, in the year 1209. on theficts.

We find several of these conventions in the charter, as in the register-book of Vendome, and that of the abbey of S. Cyprian in. Poitou, of which Mr. Galland has given some extracts, pag. 55.

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the redemption, which, by the changes incident to money, became afterwards of no manner of importance. Thus the right of redemption is in our days reduced almost to nothing, while that of the fines of alienation is continued in its full extent. As this right concerned neither the vassal nor his heirs, but was a fortuitous case which no one was obliged to forsee or expect; these stipulations were not made, and they continued to pay a certain part of the price.

WHEN the fiefs were for life, they could not give a part of a fief to hold in perpetuity as a rearfief; for it would have been abfurd that a person who had only the usufruit of a thing, should dispose of the property of it. But when they became perpetual, this was † permitted, with some restrictions made by the customs §, which was what they call dismembering their sief.

THE perpetuity of feudal tenures having established the right of redemption, the daughters were rendered capable of succeeding to a fief, in default of male issue. For when the lord gave the fief to his daughter, he multiplied the cases of his right of redemption, because the husband was obliged to pay it as well as the wise. This regulation could not take place with regard to the crown; for as it was not held of any one, there could be no right of redemption over it.

THE daughter of William V. count of Toulouse, did not succeed to the county. But Eleanor suc-

<sup>+</sup> But they could not abridge the fiefs, that is, abolish a portion of

<sup>5</sup> They fixed the portion which they could difmember.

This was the reason that the lords obliged the widow to marry.

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ceeded to Aquitaine, and Mathildis to Normandy; and the right of the succession of semales seemed so well established in those days, that Lewis the Young, after his divorce from Eleanor, made no difficulty in restoring Guyenne to her. But as these two last instances followed close to the first, the general law by which the women were called to the succession of fiess, must have been introduced much later \* into the county of Toulouse, than into the other provinces of France.

The constitution of several kingdoms of Europe has been directed by the state of seudal tenures at the time when those kingdoms were sounded. The women succeeded neither to the crown of France nor to the empire, because at the establishment of those two monarchies, they were incapable of succeeding to siefs. But they succeeded in kingdoms, whose establishment was posterior to that of the perpetuity of the siefs, such as those sounded by the Normans, those by the conquests made on the Moors; and others, in short, which beyond the limits of Germany, and in later times, received, in some measure, a second birth, by the establishment of Christianity.

WHEN the fiefs were at will, they were given to such as were capable of doing service for them, and therefore were never bestowed on minors; but \* when they became perpetual, the lords took

<sup>\*</sup> Most of the great families had their particular laws of succession. See what M. de la Thaumassiere says, with regard to the families of Berry.

<sup>♦</sup> We see in the capitulary of the year 877, apud Carisacum, art.
3. Baluzius's edition. tom. 2. p. 269, the moment in which the kings caused the fiefs to be administered in order to preserve them for the minors; an example followed by the lords, and which gave rise to what

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from it. WHEN the fiefs were for life, it was customary to yow fealty for a fief; and the real delivery, which was made by a scepter, secured the fief, as it is now fecured by homage. We do not find that the counts, or even the king's commissaries, received the homage in the provinces; nor is this ceremony to be met with in the commissions of those officers. which have been handed down to us, in the capitularies. They fometimes, indeed, made all the king's fubjects take an oath of allegiance +; but fo far was this oath from being of the fame nature as the fervice afterwards established by the name of homage, that it was only a \* ceremony, or less folemnity, occasionally used, either before or after, that act of obeifance; in a word, it was quite a diffinct thing from homage.

we have mentioned by the name of the guardianship of a nobleman's children.

We find the formula thereof in the second capitulary of the year 802. See likewise that of the year 854, art. 13. and others.

<sup>\*</sup> M. Du Cange in the word hominium, pag. 1163. and in the word fidelitas, pag. 474. cites the charters of the ancient homages where these differences are found, and a great number of authorities which may be seen. In paying homage, the vastal put his hand into that of his lord, and took his oath; the oath of scalty was made by swearing on the gospels. The homage was performed kneeling, the oath of scalty standing. None but the lord could receive homage, but his officers n ight take the oath of fealty. See Littleton, seet, pr. and pr. of homage, that is, sidelity and homage.

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THE counts and the king's commissaries made those vassals + whose sidelity was suspected, give occasionally a security which was called firmitas; but this could not be an homage, since the kings § gave it to one another.

And though the abbot Suger ¶ makes mention of a chair of Dagobert, in which, according to the testimony of antiquity, the kings of France were accustomed to receive the homage of the nobility; it is obvious that he expresses himself agreeably to the ideas and language of his own time.

WHEN the fiefs descended to the heirs, the acknowledgment of the vassal, which at first was only an occasional service, became a regular duty. It was performed in a more solemn manner, and attended with more formalities, because it was to be a perpetual monument of the reciprocal duties of the lord and vassal.

I SHOULD be apt to imagine, that homages began to be established under king Pepin, which is the time I mentioned that several benefices were given in perpetuity; but I should not think thus without caution, and only upon a supposition that the authors of the ancient annals of the Franks were not ignorant pretenders, who in describing the sealty professed by Tassillo, duke of Bavaria, to king Pepin, spoke according to the usages of their own time.

<sup>+</sup> Capitularies of Charles the Bald, in the year 860, post reditum a Confluentibus, art. 3. Baluzius's edition, pag. 145.

<sup>§</sup> Ibid, art. 3.

Lib. de administratione sua.

<sup>4</sup> Anno 757. chap. 17.

Tassilo venit in vassatico se commendans, per manus sacramenta jurevit multa & innumerabilia, reliquiis sanctorum manus imponens, & si-

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### C.H A P. XXXIII.

Continuation of the same Subject.

HEN the fiefs were either precarious or for life, they seldom had a relation to any other than the political laws; for which reason in the civil institutions of those times there is very little mention made of the laws of fiefs. But when they were become hereditary, when there was a power of giving, selling, and bequeathing them, they had a relation both to the political and the civil laws. The fief, considered as an obligation of performing military service, depended on the political law; considered as a kind of commercial property, it depended on the civil law. This gave rise to the civil regulations concerning feudal tenures.

WHEN the fiefs were become hereditary, the laws relating to the order of fuccession must have been relative to the perpetuity of fiefs. Hence this rule of the French law, estates of inheritance do not ascend , was established in spite of the Roman and Salic \* laws. It was necessary that service should be paid for the fief; but a grandfather or a great uncle would have been too old to perform any service; therefore this rule took place at first only with respect to the seudal tenures, as we learn of Boutillier †.

delitatem promisit regi Pippinio. One would imagine that here was an homage and an oath of fealty. See the penultimate note above,

Book 4 de feudist tit, 59.

<sup>.</sup> In the title of allodia.

<sup>1</sup> Somme Rurale, book 1, tit. 76. pag. 447.

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When the fiefs became hereditary, the lords who were to fee that fervice was paid for the fief, infifted that the § females who were to fucceed to the feudal estate, and I fancy sometimes the males, should not marry without their consent; insomuch that the marriage-contracts became in respect to the nobility both a feudal and a civil regulation. In an act of this nature under the lord's inspection, regulations were made for the succession, with a view that the heirs might pay service for the fief: hence none but the nobility at first had the liberty of disposing of successions by marriage-contract, as has been justly remarked by ¶ Boyer and ♣ Aufrerius.

IT is needless to mention that the power of redemption, founded on the old right of the relations, a mystery of our ancient French jurisprudence which I have not time to develop, could not take place with respect to the siefs, till they were become hereditary.

## 

AT a period when most authors begin their treatises upon fiefs, I conclude mine.

<sup>§</sup> According to an ordinance of S. Lewis, in the year 1246, to fettle the customs of Anjou and Maine; those who shall have the care of the heiress of a fiel shall give fecurity to the lord, that she shall not be married without his consent.

<sup>1</sup> Decision 155. No. 8. & 264 & No. 38.

<sup>...</sup> In Capell. Thol. decision 453.

<sup>+</sup> Eneid, lib. 3. v. 523.

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